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CALIFORNIA JUDGES ASSOCIATION

The Voice of the Judiciary

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March 24, 2016

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: Study K-402 – Mediation Confidentiality

Dear Ms. Gaal:

I have been authorized to write to you by the Executive Board of the California Judges Association. I am a retired judge member of that board and am in the 2nd year of a three year term. In an earlier lifetime, before retirement in May 2011, I spent just shy of 18 years on the Ventura County Superior Court, 10 ½ of those years as Supervising Civil Judge where my primary daily diet was 4 to 6 Mandatory Settlement Conferences (*mediations on steroids!*) per day. Before retirement I presided over or conducted more than 9,500 of such settlement of which an estimated 85% to 90% were successfully settled.

Since retiring I have engaged in a private ADR practice in my own firm, not affiliated with any of the "corporate" ADR providers and have conducted over 250 private mediations.

The California Judges Association opposes the proposed changes as presently set forth in Study K-402. It is our belief that it is the confidentiality of the mediation process that, in large part, allows it to be successful in the settlement of cases as the comfort of candor, by counsel, disputing parties and the mediator is a major component of that process and its success.

Private mediation also plays a significant part in controlling the trial case load of the Superior Courts of our state. It lessens the burdens of the terribly underfunded civil trial courtrooms, civil trial judges and staff by resolving cases with no economic cost to the court or the justice system. Unfortunately, we see no short or medium term likelihood of significant increases in funding for the civil trial departments of our courts whose cases loads are significantly relieved by the private settlement of cases where ***unfettered private civil mediation*** is available. We believe that dynamic will substantially change for the worse if mediation confidentiality is abrogated.

Mediation is a favored public policy of the California Courts and the same is true in the federal courts. To adversely impact that favored public policy, even in the extraordinarily rare cases of "legal malpractice claims" by litigants who, most likely are suffering from post-settlement *settler's remorse* rather than the victims of true violations of the standard of care by their counsel, would be short sighted and should be (we would argue **must be**) avoided.

At the very least, if the statutory confidentiality of the private mediation process is going to be invaded, certain exceptions to that invasion must be preserved. To wit:

- Mediators must be statutorily deemed legally incompetent to testify in State Bar Court as well as in any civil court in legal malpractice actions against an attorney arising from a private mediation.

- Only a client alleging misconduct and the lawyer defending against the claim can be subject to subpoena to testify about mediation communications or turn over **their** documents created for mediation.

- Mediation statements made by persons other than the client alleging misconduct and the lawyer defending against the claim **must be prevented**.

- Such exceptions should apply only in cases where a client alleges misconduct by their own lawyer.

I reiterate, however, that it is the California Judges Association position that there exist no valid reasons, including the very rare claim of malpractice by an attorney during the mediation process, to justify an abrogation of the existing statutory confidentiality of the mediation process. It is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice that confidentiality.

Thank you for considering our views.

Yours very truly,

David W. Long
Judge of the Superior Court (Ret.)
Member CJA Executive Board

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August 18, 2017

California Law Revision Commission
C/o Barbara Gaal, Chief Deputy Counsel
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: Study K-402 – Mediation Confidentiality – Presently Proposed Legislation

Dear Commission & Ms. Gaal:

Supplementing our earlier letter of March 24, 2016, the California Judges Association Executive Board now responds to the CLRC's request for *Public Comment* on its proposed legislation dealing with changes to California's mediation confidentiality statutes. I have again been authorized to write to you in CJA's behalf.

We have also read thru all 156 pages of the Staff Report of June 2017.

Short version, we strongly oppose the proposed legislation in its present form.

As indicated in our March 24, 2016 letter, we believe that the public policy served by mediation confidentiality is of such great value in permitting the effective resolution of civil cases short of trial that it should be preserved. There is simply too little, if any, justification for the abrogation of confidentiality encompassed in the Commission's current legislative proposal.

To a great extent, we are guided by the six Justice plurality plus separate concurrence in the California Supreme Court decision in *Cassel v. Superior Court* (2011) 51 Cal. 4th 113. We certainly take note of Justice Chin's brief written concurrence and comment, which singular comment appears to be the genesis of the CLRC's current exercise in Study K-402.

The Supreme Court Justices found:

"[T]he mediation confidentiality statutes do not create a "privilege" in favor of any particular person. ***Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation.*** *The mediation confidentiality statues govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants*

that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement. ***To assure this maximum privacy protection, the legislature has specified that all mediation participants involved in a mediation-related communication must agree to its disclosure....***"

"*Moreover, as real parties observe, the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects against either." (Cassel excerpts @ 131-133; Emphasis Ours)*

Although that six Justice plurality plus Justice Chin's concurrence also observed the obvious, that the legislature was free to reconsider whether or not the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys, the six Justices did not themselves "recommend" such review. Only Justice Chin implicitly did.

Realizing that it was going to be probable that the Commission was going to make recommendations to the Legislature in some form that would at least in part abrogate mediation confidentiality, CJA then focused on protecting mediators' (retired judges or otherwise) presently existing *legal incompetence* from being compelled to testify and otherwise protecting mediators' writings, documents and the like from discovery or trial.

On pages 9 – 11 of her *First Supplement to Memorandum 2017-30,* Ms. Gaal points out portions of *Staff Analysis* more articulately than I did in my numerous appearances before the Commission over the past two years. These are things that should bear strong consideration in formulating your final proposal. I attempted to also present the same thoughts to you. These include, **making sure a mediator is "left alone"** re not having to provide discovery or evidence at trial; **precluding a civil litigant from obtaining a mediator's electronic files from the mediator's ECS or RCS**, i.e. not allowing a litigant or counsel to **obtain through a back or side door what they cannot obtain through the front door; precluding disclosure of specific categories or evidence**, from: **all of a mediator's records relating to a mediation** conducted by the mediator, to all **oral or written** communications **made by a mediator in the course of a mediation** he or she is/has conducted; to **all oral or written** communications **exchanged between a mediator and a mediation participant** in the course of a mediation conducted by the mediator.

In my discussions with you it was my sense that those concerns and the specificity needed to have them unambiguously set forth met favorably with recognition of their importance from a majority of the Commissioners if not all of you. However, the current ***Tentative Recommendation***, for the most part, presents little more than vague and ambiguous language that, from a judicial perspective, provides no substantive guidance as to how it is to be implemented.

As I said to you on a number of the occasions I was before you, and I did so non-pejoratively, ***lawyers are nothing if not creative!*** Statutory protections of confidentiality, to be effective, must

be articulated unambiguously so that the legislative intent as to the scope of those protections is not subject to reasonable debate. The current ***Tentative Recommendation*** fails to meet any such standard of specificity.

In summary, The California Judges Association remains deeply concerned that **any incursion** into the present statutory standards of mediation confidentiality will so seriously impair the frankness and candor needed for successful mediations that it must be avoided.

Additionally, California Rules of Court, Rule 3.854 (b) currently requires mediators to, "*...At or before the outset of the first mediation session, **a mediator must** provide the participants with a general explanation of the confidentiality of mediation proceedings."* (Emphasis ours.) It seems obvious that mediators will now, if your proposal is adopted, have to provide an additional explanation to parties at the outset of the mediation that whatever they or their lawyers say in the process of the mediation is **no longer confidential and can be used in a legal malpractice case against their lawyer!**

Rhetorically we ask, "*What lawyer in his/her right (self-defensive mind) will want to bring clients to a civil mediation when the first thing their client is told is a reminder of their right to sue that very lawyer, that confidentiality of that communication does not apply, and they are being told that by an significant authority figure, whether a retired judge or other mediator?* And imagine the questions such a mediator is likely going to have to try and answer when the client asks questions about that admonition.

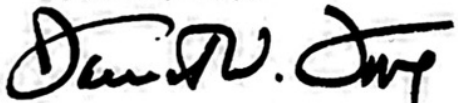
The potential impact of having the hundreds, if not thousands of cases, now being settled in mediation each year coming back to the civil trial calendars of the courts of our state is staggering. Those courts don't have the economic funding to handle the work load they have now and can see little likelihood of any significant changes in the foreseeable future.

Given these concerns, we regret to advise you that the California Judges Association will be opposing that proposed legislation if it remains in its present form.

On a personal note, if I may, I express my appreciation to the Commissioners and to Ms. Gaal for the warm, thoughtful and professional cordiality I have been extended on the multiple occasions I have had the pleasure of appearing before you. To say it is greatly appreciated would be a gross understatement.

Thank you again for considering our views.

Yours very truly,



David W. Long
Judge of the Superior Court (Ret.)
Member CJA Executive Board

PART III. PROPOSED LEGISLATION

Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context

SEC. ___. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code.

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

(c) In applying this section, a court may, but is not required to, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar judicial technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.

(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

(f) Nothing in this section is intended to alter or affect Section 703.5.

(g) Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

Comment. Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services." *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); *see also id.* at 1239. "Misconduct does not 'aris[e] in' the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct." *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation. This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

To be admissible or subject to disclosure under this section, however, mediation evidence must be relevant and must satisfy the other stated requirements. To safeguard the interests underlying mediation confidentiality, that is a stricter standard than the one governing a routine discovery request. *Cf.* Code Civ. Proc. § 2017.010 ("Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*." (emphasis added).)

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.

- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the admissibility or disclosure of mediation communications pursuant to this section.

Subdivision (c) gives a court discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.552). Any restriction on public access must comply with constitutional constraints and other applicable law. See, e.g., NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Under subdivision (d), when a party files a legal malpractice case in which mediation communications or writings might be disclosed pursuant to this section, that party must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the malpractice case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

Subdivision (f) makes clear that the enactment of this section in no way changes the effect of Section 703.5.

Subdivision (g) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation"). For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

Uncodified (added). Operative date

SEC. ___. (a) This act shall become operative on January 1, 2019.

(b) This act only applies with respect to a mediation or a mediation consultation that commenced on or after January 1, 2019.

Comment. To avoid disrupting confidentiality expectations of mediation participants, this act only applies to evidence that relates to a mediation or a mediation consultation commencing on or after the operative date of the act.

Joseph Lovretovich
JML LAW, APLC

ADVOCATE
August 2020

Ten steps in mediating your case

MEDIATION IS NOT A ONE-SHOT EVENT LIKE A LOTTERY OR A SLOT MACHINE; IT'S A PROCESS, JUST LIKE A TRIAL

Mediation is the most misunderstood tool in our plaintiff litigation practice. I have now been mediating cases for over thirty years. I have probably mediated over twenty-five hundred cases. As I read the listservs every day, I am surprised and troubled about how many practitioners really do not understand the process and how to make it work for them.

It seems that a lot of attorneys go into mediation as a one-shot event that they liken to the lottery or a slot machine. They do not understand that mediation is a process just like trial. One needs to devote extensive effort and skill into making the process meaningful and successful. So many times, I hear people asking what mediator out there will get them the most money, as though some mediators can just deliver dollars no matter the nature or progress of the case.

So, I thought I would share some of the tips that I have developed over the years. I can say that we probably settle 90% of our cases either at the mediation or at a mediator's proposal shortly thereafter. These tips should help the more novice practitioner navigate the process to a more successful result.

1. When should you mediate your case?

You get a new case in the office and shortly after you notify the defendant, some lawyer calls you and tells you that you should stay everything and go to mediation. This is fairly common now and so many lawyers are disappointed when they jump at this inquiry and put out substantial money only to get a nuisance value offer at the end of the day.

Basically, the mediation call comes at certain stages:

- Immediately after notice of the claim;
- after the lawsuit is filed;
- after discovery;
- after summary judgment and on the courthouse steps.

The first two stages should be treated with great suspicion. Many lawyers think that this early stage is based on the fear of the defendant. In reality, many factors may come into play, such as insurance companies putting pressure on defense counsel to limit fees; feelings that defense can intimidate your client by scaring them if they don't take the low-ball offer, etc.

There are really only three times that one should mediate at such an early stage of the claim.

First, you have a case with substantial smoking-gun evidence that can't be refuted, with a high-profile defendant and a noteworthy claim that will result in massive publicity. In those instances, you should mediate because that would be clearly in the best interest of your client. But you should set some parameters. You should make a written demand and demand a written response. You should pick your mediator or at least provide a panel to pick from. And you require the defendant to pay the majority of the fee.

Second, you have a small case with a client who you do not feel will be able to hold up in the litigation process or a plaintiff who is erratic and the type who could abandon the case during the litigation. In that instance you will want to get out with the best deal you can get, so you should just set it up and go for it.

Third, you have a defense counsel with whom you have litigated many times and who you can trust. This will not happen with beginning lawyers but after doing this for as long I have, I do have a handful of defense lawyers who will call me up, take me to lunch and then have an honest discussion about our relative positions. We then go to mediation and resolve the matter.

Other than those three instances, you need to litigate your case aggressively and not suggest mediation at the outset. If the defense approaches you about mediation, pick a date some months out. You might limit discovery such as one day for the plaintiff and one day for PMQ or other relevant witnesses. You will want to have your written discovery answered, especially to determine the nature of potential insurance coverage. I cannot stress enough that *you cannot keep pestering defense about mediation*. That will send a message to counsel that you are desperate to settle and will probably result in disappointment at the defense settlement value. With the current attitude of the trial courts, you will be able to use the court to push mediation rather than you risking it.

Also, I cannot stress enough that you have to be willing to try your case. If the defense gets the idea that you will not try your case, it will depress the value of your case. Trust me, the defense talks about us and if you are labeled with a fear of trying a case, it will be death to any negotiation. You have to try a case at least every couple of years. Of course, some lawyers are constantly in trial, and those are the ones who get the largest settlements. But even if you only try your losers and lose a lot of your cases, you will have credibility in the other room.

2. How do you set up your mediation?

Now that you are ready to set up your mediation, you have to pick your mediator and set it up. The first tip you should understand, if the defense has been the one pushing the mediation, it is important to document it. Earlier in my career,

I regularly went to a mediation pushed by defense only to have the mediator walk in with a ridiculous offer,

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saying that they are only there because I begged them to come. Then the mediator spends the first hour arguing over whose idea it was to be there in the first place. This happens for a couple of reasons. First, it may just be a disreputable game-playing defense lawyer. Second, it may be a lawyer who fears the case and is getting his reluctant defendant or adjuster to the mediation in hopes that the mediator will bear the bad news. He certainly doesn't want to admit that in front of his client. He has probably told his client that it was the plaintiff begging for mediation.

The only way to circumvent this ploy is to confirm the terms of the mediation in an email. Lay out that you are going to mediation because the defense was pushing it. That way when you are faced with this tactic, you can pull out the email and give it to the mediator and short-circuit that argument in a matter of minutes.

Next, you will have to pick a mediator. I am going to deal with mediator choices in the next section but I strongly recommend you try to let the defendant pick the mediator. We do this first to prevent the obstructive lawyer who just keeps rejecting whoever we suggest. Second, you do want the defense lawyer's input in most instances. I usually suggest that the defense give me a list of potential mediators from which to choose. If the defense counsel is being sincere, you should find a couple of names off his list that would have been on your list. At the same time, his or her list will tell you volumes of where the defense is coming from. If you get a list of total defense hacks, you know that you are going to have problems getting real value on your case.

The next consideration is who is paying for the mediation. As I said at the outset, there are times when you want to really push to have defense pay the whole fee. Other than that instance, we generally agree to pay for half of the mediation fee. From the outset we are trying to project strength in our case and our ability. I feel that begging the defendant to pay most of the fee on every case is counterproductive. Having said that, the guys who are constantly in trial are known to make the defense pay, and because of their trial ability, they can do so without showing weakness. But if you are a newer lawyer, trying to require the defense to pay will project some desperation. Of course, there are exceptions to every rule. There are a few defense lawyers who will never offer fair value and who use the process to attempt to intimidate you and your client or use the mediation for a billing event.

(I am not going to name names in this article, but you should use your listservs to learn about the practices of your opponents and mediators. I think it is malpractice not to vet both before mediation). With those attorneys, you should demand that they pay.

As far as timing for the mediation, the farther out you can schedule the mediation, the better it will be for retaining one of the best mediators. While there are some newer mediators who are turning out to be rock stars that are available on short notice, the most seasoned successful mediators are booked out for months.

3. Who should you pick to mediate your case?

Now that you are going to set up a mediation, who are you going to use? The first thing you should do if you are going to mediate cases is to develop a short list of "go to" mediators. We have a list of about 30 mediators we will consider using, but in reality, we mediate most of our cases with about 10 mediators. Why is that? Mediation is a process. You want to be able to trust your mediator. You want to know how they think, and you want them to know how you think. You want their candid assessment of your case as well as of the attorney and defendant in the other room. We do not expect the mediator to breach confidences, but there is a lot the mediator can tell you about the atmosphere in the other room and who the decision maker appears to be. You need that information if you are going to assess the potential for value and whether settlement is possible. Also, the mediator can share his or her prior experiences with you in the other room to get a better response from them.

There are mediators who are very adversarial and are thought to be highly successful mediators. I personally don't need a mediator to berate me about the facts of my case. I know the strengths and weaknesses, so I want it to be a comfortable process for me and my client. However, while I generally do not have client-control problems, in the event I do, I want the mediator to be willing to step up and firmly deal with my client. In that instance, I don't want a screaming, offensive mediator getting in my client's face.

If you don't have experience with many mediators, how do you develop the knowledge you need to pick a quality mediator? Use your listserv. Once you get responses, call the attorneys up and have a conversation with the listserv responder. Don't base your decision on a one-word comment. And be especially careful about the anecdotal information. Using a mediator is a very personal experience with a myriad of personalities. Sometimes a mediator's personality may not mesh with everyone's. There are a few very highly regarded mediators that I just do not work well with. I don't use them. If I do comment on them on the listserv, I will candidly tell people that.

Some listserv posters, however, have personal conflicts over a failed mediation and they may skew their responses. So, what I am telling you is make sure to get a whole picture before deciding on who to accept. Finally, never go to a mediator just because he or she got someone a lot of money recently. That may not be your case; there are a million reasons why a case settles and more than likely you will not learn all of those reasons in a listserv post.

4. What style of mediator should you use?

There are various styles of mediators with many different talents. There are many out there that just carry numbers.

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ADVOCATE
August 2020

I would stay away from that type of mediator. They offer no input and just go back and forth until there is a lockup. Those mediators will sometimes do a proposal that is simply based on the midpoint, which rarely settles the case and just leaves bad feelings.

If you have insurance coverage in your case, you should pick a mediator who relates to insurance people and so will be able to talk to them in their language and understand the hierarchical impediments they may have. In that instance, the mediator may be able to cut into that hierarchy without causing hurt feelings and get to the decision maker.

If you have a case that certainly has trial potential, you should look for a mediator with strong trial experience. I especially like to use someone who was a defense trial lawyer or a very experienced judge. That mediator will have real credibility in the other room as to how the trial will play out.

Should you use a retired judge? That is a tough question. Judges who had a heavy trial calendar in complex litigation can be very helpful. However, newer judge mediators may have trouble making the transition. They are used to very short settlement conferences where they can issue orders and make demands on the parties. They will candidly tell you that they can get very frustrated by the process and give up early.

At the same time, some judges have tremendous clarity and reputations for getting cases settled. You may not spend a lot of time with those types of mediators, but you will get the deal done quickly.

5. How should you prepare for mediation?

Okay, now that you are going to mediation, how should you prepare? First, you have to decide whether you are going to give a demand before the mediation. This is probably one of the most controversial issues in mediation. I strongly believe that a demand should be made and briefs should be shared.

First, why give a demand? Many lawyers are afraid to put out an opening demand. They are fearful that the defense may pull out of mediation. That is a reasonable fear. There are some defense attorneys who solicit a demand before they agree to mediation. And some of them will use that to refuse to mediate ostensibly because your demand is too high. Then you give a lower demand and they do the same thing; it just continually drives you down. All you can do is to stick with your original demand. What we do is to make a realistic demand that we believe we can achieve. We give it to the defense and tell them we are only doing so in return for an offer from them. In this scenario you will have to stand on your demand if you get rebuffed. We tell them we are not ever going to lower our demand in the absence of their offer.

Make a demand

Why do we almost always give a demand? Remember the defense has no idea what you are thinking on the value of your case. If you are silent on the value of your case, you are inviting two things: First, you are putting that responsibility in the hands of the defense attorney to advise his client. If he puts a value in excess of your eventual demand, he looks like a fool to his client and will not be relied upon during the negotiation. If he comes in with a much lower number out of your range, you know he is going to stick with that. What are the odds that he is going to tell his client that he seriously undervalued the case? Zero. Instead he will be an obstacle to the process and will do everything he can to scuttle the settlement. If the mediator gets beyond him and gets the client to overrule him, you now have an enemy on the next case.

Second, and probably more common is that with an unknown number on the table, the decision makers will engage in the nefarious "round table." How many of us have gotten to a mediation to find that some obscure non-identified group has had a meeting and put a number on a case. Think of the psychology of that process. Who in a round table group is going to go out on a limb and suggest a much higher number? No, what you have is a group trying to see how low each can go. This is especially true when liability is complex and murky.

Therefore, we like to come in strong. We like to share our briefs with detailed information and with a demand that will be supported by the case. We expect that when we go to mediation, we know our case and have set a minimum value that we will take. Most of the defense lawyers we deal with understand that. They know we are invested in the case and not just hoping for a quick settlement. They can show their clients that we are experienced and will not be bluffed into a lower number. With a demand in brief a week in advance there is at least some time on the defense side to consult and evaluate your position.

6. Should you agree to a joint session?

You now arrive at the mediation and it is about to begin. The first decision your mediator may ask you to make is whether to agree to a joint session. There was a time when mediators regularly demanded that all parties sit in a room and go over the facts of the case. In fact, one well-known mediator would require that the parties talk to each other as to how they felt about the events. Let me be clear. I never allow this scenario to occur.

Thankfully, most mediators no longer push this process. But if one does, you have to hold your ground and refuse. Your client more than likely has been abused and humiliated in the workplace. The client does not need that process to continue in the mediation. You must make your client feel safe and protected in the process. That is not the way to do it.

Having said that, there may be instances where the defense counsel has never met your client. Unless your client makes a terrible appearance, it is fine to have a simple meet and greet where the mediator expresses how everyone is there to work together towards resolution. But even in that instance, get your client's buy-in before you agree.

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7. Should your client be in every decision on settlement negotiations?

I never engage my client in the negotiation process. I usually get some understanding before the process begins from the client as to a range that the client is willing to accept. As long as I don't get below that range, there is absolutely no reason to involve the client in the process. Usually you will open with a large demand, which is much higher than the value of the case. And you will probably drop faster than the defense moves up. That creates a very disturbing and stressful time for a sensitive client. You will probably get from them that they are losing money on every move. Or they will not understand why we are moving down faster than they are coming up.

Most clients are not sophisticated negotiators (if they are, you are probably in a lot of trouble). Don't involve them in the process and make sure the mediator is not coming in and giving you numbers. Make the mediator understand that numbers should only be shared with you. Tell the client before the mediation that you may have private conversations with the mediator and that it is not meant to hide the ball or double deal on them.

There are some counsel who put their client in a separate room and keep them in isolation for the entire day. I do not like that strategy. You want your client to feel like they are part of the process. A lot of clients are dubious of this process and may think this is a setup between the lawyers in advance to get the client to take a low number. If you have your client involved, that usually is not an issue.

8. What about different strategies in demands and offers?

In some instances, negotiations will break down early and parties take intractable positions. Maybe both sides don't trust each other. Maybe the defense counsel is afraid to disclose their position. In that instance, the mediator may suggest bracketing. That device means that you agree to go to a specific number if the defense rises to a certain number. In that way you are not giving up your negotiating position unless you get the appropriate response. Just understand that the bracket has a midpoint. And even though everyone will proclaim that the midpoint shouldn't be relied upon, everyone looks at that midpoint.

In some instances, the mediator will get one of the parties to make a substantial move in return for a suggested response. That, of course, is voluntary and this process should never be used unless you have a strong and trusting relationship with the mediator.

Finally, a mediator may use the mediator's proposal. Good mediators will use the information from the day and come up with a proposal that they think will settle the case. It should not be based on what one of the parties will say. Some mediators ask the defense if they will consider a proposal at a certain number. That is a terrible way to do it. When they do that, the defense now controls the proposal number and keeps driving that number down. If the mediator tells you he or she is going to make a proposal, find out how they are going to arrive at that number. Don't do it if they are going to get a number defense will authorize.

9. You now have an agreement, but the truth is in the details

After a long, fought-out day, you have a deal. Suddenly out of nowhere the defense tells you that they have to make payments over ten years and they are going to treat 100% as wages and issue a W-2 and they are demanding confidentiality of all terms, etc.

Most mediators will tell you that you should not address these issues up front. I disagree in most instances. First, you should try to get the defense counsel to send you their proposed settlement agreement before the mediation. A large number of mediators do now push the defense to get the agreement to plaintiff's counsel in advance. At least in those instances, you will raise those issues up front if they share the agreement.

On the tax issues, there are a number of repeat-player defendants that have taxation policies that are onerous. You should know that in advance, so again, using the listserv can help you understand those policies. In some instances, you will have some defense attorney come up with an outrageous policy and tell you that the company will not bend. You may be able to show him that they have deviated from that policy in the past.

With respect to the claim of poverty, you need to address that as early as possible. Where you have defense counsel tell you that in advance, you must demand all of their financials in advance. When they refuse to give them to me, I tell counsel I will not consider their financial condition in my negotiation and we might as well cancel if they are going to assert it. You should also do your own research in advance. There are many online resources you can use to evaluate the financial viability of defendants, and you must use them.

Other issues that come up are confidentiality and no-rehire clauses. These are basically unlawful in most cases and you should refuse to allow them in the settlement agreement. At the very least, confidentiality should be mutual.

10. What if your case doesn't settle?

Your mediation locks up and doesn't settle. What do you do next? The first thing you should not do is immediately call the defense lawyer and start negotiating. You should get your mediator to follow up to see if the matter can settle. Many times, the mediator will suggest certain acts take place and then revisit the case. All of the mediators I use are willing to engage in this follow up. There are a few that won't, and I suggest you not use them. The only time you will want to deal directly with opposing counsel is if you suspect that the mediator has not been truthful with you.

This brings me to the one thing you should never do in a mediation. Do not take a stance with the mediator that you do not intend to stand by. If you tell your

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mediator all day long that you will not take a certain number, do not call defense counsel right after the mediation and take that number. The mediator's stock in trade is his or her credibility. If they go in the defense room and repeatedly tell them you will not consider the range they are proposing and then after the mediation, you accept it, your mediator looks either like a fool or looks like he is not truly neutral. That will make him or her ineffective in any further mediations with that defense counsel, and like us, defense lawyers talk, and if word gets out, that mediator will be damaged goods.

Conclusion

Keep in mind that your mediator is the one person who is hearing what is going on in both rooms. Respect his skills and intuition as to what is doable. If that is not satisfactory, then there is nothing wrong with walking out the door. A mediator's job is to settle cases, and most will try to keep you there. But when they tell you to walk, respect their opinion and don't take it personally.

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Wrong-way mediation

The Top Ten ways not to settle your personal-injury case at mediation

By Robert M. Tessier

How have your settlement rates at mediation been lately? Are you happy with the settlements you are obtaining at mediation? Do you think you could be doing better for your clients at mediation?

If you have been disappointed with your results at mediation, then read on for some practical advice and recommendations to consider from a mediator who has successfully mediated over 4,000 personal-injury cases. It is my hope that giving consideration to each of the "10 things" discussed below and implementing the suggested best practices will increase the chances of a successful mediation for your client.

While mediators are at their core a relatively helpful group, in the interest of full disclosure, my motivation for writing this article is two-fold. One, I see too many cases result in no settlement for very deserving plaintiffs at the first mediation. Two, a mediation session resulting in no settlement is another case I will tirelessly follow up on until trial. So, if I can help you increase your chances of a good settlement and a happy client at mediation, then it's a win-win!

Because there are so many articles about things to do before mediation, my point of view for this article is to highlight some of the things that occur repeatedly in mediation that seem to be significant impediments to achieving a settlement. A few of these suggestions may seem counterintuitive, and even the opposite of how you have approached mediation for many years. For those things, I ask for your thoughtful consideration and an open mind.

10. Marking your brief as confidential

This one may seem controversial to many lawyers. After all, we "grew up"

submitting confidential MSC statements going back to the 1980s. Everyone believes a mediation statement needs to be confidential. *Au contraire*.

A confidential brief really is unnecessary. Very rarely does a mediation brief contain anything truly confidential. Most mediators will ask plaintiff's counsel whether there is anything in the confidential brief that they do not want shared with the other side, and rarely does anyone say yes. A mediator needs to be armed with information that can be shared and discussed with the other side in order to be effective. Handcuffing the mediator with a "confidential" brief impacts his or her ability to be effective.

A confidential brief really has two very bad side effects. One, the process is slowed down because the defense may or may not have all of the information about the nuts and bolts of your case (e.g., amounts of medical expenses and names of providers, details of your client's loss of earnings claim, etc.), so valuable time is spent in session on these issues. Two, problems like these could have been avoided if the other side had a non-confidential brief with these details with sufficient time to review and analyze them.

Some lawyers say that they don't want to submit a non-confidential brief if the other side is going to submit a confidential brief. That is a fair point. Therefore, it would be best to have *all* briefs be non-confidential. That is what I request in all of my mediations. It is also true that the plaintiff has the burden of proof, so whatever critical non-confidential information you have about the plaintiff's harms and losses should be in the hands of the defense decision makers in plenty of time for them to consider it. When the defense has not obtained everything important through discovery before mediation day, please consider a non-confidential brief no matter what type of brief they serve. The chances of a successful mediation are reduced when the defense sees or hears critical information for the first time at mediation.

Suggested best practice: Submit a non-confidential mediation brief. If there are details which you feel must be kept confidential and the mediator must know these details, submit *separately* a short email or writing for "the mediator's eyes only" to alert him/her to those details. Or just call the mediator if the details are too sensitive to be put in writing.

9. Submitting a late brief

Many of the best mediators in the personal injury world are former practicing lawyers in the field. We still remember how a busy practice can result in submissions being late, and so are very forgiving. Nevertheless, a late brief (especially if it is lengthy) is not much better than no brief at all, particularly when it is accompanied by a "document dump" of hundreds and hundreds of pages of exhibits.

Picking up on the discussion of non-confidential submissions, a late submission, particularly if it contains new information such as recent medical care, surgical recommendations, or an analysis of plaintiff's economic harms and losses, can have disastrous effects at mediation. This is a tremendous unforced error. To understand why, let's look at how the defense gets settlement authority in most cases.

Normally, at some point before mediation, maybe days but hopefully weeks before, the defense attorney will analyze what he or she has obtained through discovery (interrogatories, production requests, subpoenas, and depositions) and provide a report to the claims adjustor. In most, but not all cases, the attorney will provide insight into case value. If you've made a demand, it will be reported. The adjustor will then review the letter from the attorney, and documentation provided, and then make a recommendation and/or request to his or her superiors or claims committee for settlement authority. That authority is how much money the adjustor will have in his or her pocket at the start of mediation.

That timeline is critical. A late brief with a lot of new information, not heretofore known to the defense, that could drive value upward, cannot be considered *before* settlement authority is extended. As a result, the authority for the case may not be in line with the plaintiff attorney's expectation or the evidence.

This situation sometimes results in the defense pulling up stakes and leaving the mediation without a meaningful offer being extended, or worse, the defense will simply ignore the late-provided information and become recalcitrant. If your goal is to blow up the mediation for some strategic or tactical reason, a late-submitted confidential brief with a lot of new information is one of the best ways to do it.

All of these concerns are over and above the difficult practical situation the mediator is put in with a late brief of any significant length. The least desirable practice is for you to walk in a long brief with every medical record in your file attached on the day of mediation. Hopefully you feel that your mediator's role is to facilitate the best possible settlement attainable. Dropping a 10-pound confidential brief on the mediator on the day of mediation is the least effective way to achieve that end. Mediators do not have adequate time to review and digest it.

Suggested best practices Numbers 10 and 9 should really be read together. Whenever possible, submit a concise non-confidential brief in plenty of time before the mediation for the defense to review and analyze everything you consider relevant to a fair evaluation of your client's case.

8. Failing to prepare your client for the mediation

Believe it or not, every once in a while (pre-pandemic), I had to introduce the plaintiff to his or her lawyer at the mediation! That of course is the worst possible scenario. But aside from that type of disaster, a little preparation can be very helpful to the process.

Client preparation should involve a few basic steps, and most mediators will

go over some of the nuts and bolts of the process early on. The first step is to prepare the client for the difficulties in the early rounds of mediation. Unlike buying a car, a house, or a carburetor at a swap meet, a personal injury negotiation is both intensely personal and intensely maddening in the early goings. Most mediators are content to have the negotiation structured any way the lawyers want (whether to have the client involved in the early rounds when the insulting numbers are in play for example).

The second step is to prepare your client for an open conversation with the mediator about harms and losses. This is critically important if you believe there will come a time when the mediator will be helpful to you vis a vis your client at crunch time. Thus, please consider allowing some "getting to know you" time with your client early on, focused on your client's harms and losses. In these early discussions, the plaintiff is not only put at ease about the process, but also discusses elements of the case such as intangible harms and losses that might not have been fully communicated beforehand.

One common trait amongst the best mediators is a conversational style. A friendly discussion about harms and losses allows the mediator to be educated as to how the incident has adversely affected the plaintiff, and at the same time allows the client to feel like his or her feelings and injuries are important and cared about. These discussions often result in better settlements ultimately, especially when the mediator is made aware of the questions the defense has about the damages picture beforehand. Many an obstacle can be avoided or sidestepped as well.

Yet, there are still many attorneys who prefer the old MSC model, which put the plaintiff out "in the chairs" with no interaction with the mediator. Honestly, if you don't trust the mediator to talk with your client, and get to know him or her, you might have selected the wrong mediator for your case!

Of course, the mediation is yours. Your client has paid for the time, so if your preference is to sequester your client throughout the process, most mediators will work with that preference. However, the risk is that your client may be harboring an unmet need, such as needing to share with someone neutral how the incident has changed their life.

When I look back on cases I have not settled at mediation (and I promise, no specific war stories), my biggest regret within my control is that I did not spend enough time with the plaintiff. On the other hand, on those days when I have "pulled a rabbit out of the hat" and settled a case no one thought had a chance of settling, the single biggest factor for that magic was the engaged plaintiff who felt heard and respected throughout the process.

Mediating most dangerously and controversially for some has involved the plaintiff engaging directly with the decision makers on the defense side. I know that sounds crazy to some of you, but in the right case, and under the right circumstances, it is powerful. It is the mediation process at its most exquisite and real when all the sides are agreeable and respectful and let the "magic" unfold. Never hide a stellar plaintiff from the decision makers!

Lastly, those early discussions allow a rapport to develop. Your client will feel more relaxed about the mediator, whom they have just met, as well as the process. I believe that folks in a less stressful or less reactive state will make better decisions for themselves.

Suggested best practices: Prepare your client for three things. One, the process will be boring at times, but you can speak freely to the mediator about your harms and losses. Two, the first hour or two of the mediation will result in low offers that feel insulting. Three, the ultimate decision will be yours as to whether the case settles.

7. Forgetting about medical causation

This one is the biggest substantive omission seen at mediation. It comes up principally in cases when the plaintiff has had prior or subsequent injuries to the same body part. The defense will invariably hire a doctor to examine the plaintiff, and the doctor will review every old medical record that can be found. Their doctor will render an opinion in a report stating to a reasonable medical probability that the subject incident did not cause the need for the surgery or other care administered, but instead it was because of (fill in the blank for prior or subsequent incident). This report is sent to the mediator with the defense brief.

The plaintiff, in response, often provides no medical report establishing medical causation. The surgeon is silent on the question. Sometimes the plaintiff has not disclosed any prior complaints to the same body part to the surgeon. The case then proceeds to mediation.

In this scenario, the plaintiff and her attorney are going to be very disappointed with the offers made. The defense will make the point that no doctor for the plaintiff has opined on causation, and the doctor hired by the defense has. Naturally, the defense will put all their eggs in the defense doctor basket and make substantially reduced offers. Most often the mediation is unsuccessful, and the parties may agree to return if and when the issue is addressed by the plaintiff's treaters or medical experts.

Anecdotally, when I look at the jury sheets, I see many cases defensed on the issue of causation. The issue of substantial factor found at CACI 430 is daunting enough for the jury when trial time comes, so having eyes on this problem is good practice at every stage of the case. For purposes of trying to settle your case at mediation, do not ignore the question of medical causation prior to mediation. Just because the defense has not raised it to any great extent before mediation does not mean they won't raise it at the mediation. This issue has to be addressed at some point before trial, so to maximize the chances of a fair settlement, sooner is better.

Suggested best practice: Whenever your client has had prior or subsequent injuries to the same body part, be prepared at

mediation with a medical report discussing the issue of medical causation.

6. Dropping a last-minute life care analysis on the table to start the mediation

One tactic that has become more prevalent at mediation in the last few years is coming to mediation with a last-minute Life Care Analysis. Unlike a fully vetted Life Care Plan (which is normally prepared in concert with the planner and a physician after extensive review, containing specifics consistent with other expert's reports), the last-minute analysis is a couple of pages long with a laundry list of possible interventions not vetted by a physician. It is often internally inconsistent, disagrees with the treating physician's recommendations, and has prices that no defense attorney or adjustor would ever believe are remotely reasonable.

So far, in the dozens and dozens of times I have had a last-minute Life Care Analysis presented for the first time at the start of the mediation, I have seen *zero* dollars for them. The best thing that happens is that the defense just ignores it and negotiates with the authority they brought to the mediation. The worst thing that happens is that the defense doesn't make an offer (especially when this tactic is coupled with "wrong-way mediation" below). Either way, it is not money well spent.

Mediators are not opponents of a well-prepared Life Care Plan presented in a timely fashion. In fact, it can be effectively used when exchanged well in advance of the mediation. The best attorneys with the best cases will make good use of such a Life Care Plan, both in settlement discussions and in front of a jury.

Suggested best practice: Avoid presenting the last-minute Life Care Analysis on the day of mediation. Instead, spend your money on a well-prepared Life Care Plan and exchange it well in advance of mediation if you want the defense to seriously consider it.

5. Communicating a demand for the first time with new information regarding your client's harms and losses

Another alarming tactic at mediation of late is to wait until the mediation begins to communicate a demand. This is a tactical mistake for a couple of reasons.

First, you have missed the opportunity to anchor your case value with an initial demand before the defense evaluates the case. The defense attorney or adjustor who reviews the case to determine settlement authority without a demand from the plaintiff will often evaluate the claim lower than if they have a comprehensive demand in their file at the time of review. You want the opportunity to have your voice heard *before* the committee meets to discuss value, not after.

Second, if your demand is made for the first time at mediation and is accompanied by new information in the form of new medical records, or of earnings-loss documentation that the defense did not have before, then your starting demand is probably going to be at such a high number that the defense will end the mediation before it begins. For example, if the defense has been provided records documenting conservative care for your client before mediation, but then you come to mediation with new evidence that your client recently had a fusion surgery, or a neuropsychological evaluation documenting a TBI that was not disclosed before, there is a very high probability your demand will be significantly higher than the defense is expecting, and they will see the case as one that cannot be settled at the mediation session.

Obviously, your client has to get the care he or she needs when they can get it. And during Covid, that has proven challenging.

The issue is not whether your client should or should not get necessary care. Rather, the issue is the timing of mediation and the making of a demand relative to this care. A scenario such as the one sketched above probably ends up with a failed mediation, and a request from defense counsel to have time to re-evaluate the case based on the new information.

Therefore, it is not recommended to orchestrate deliberately this kind of last-minute reveal of new damages information. At best, mediation becomes a two-step process after the re-evaluation is completed. But at the same time, sometimes it cannot be helped due to busy schedules that plaintiffs get medical care in real time, and often right before mediation.

Suggested best practice: Don't wait until you prepare your mediation brief to make a demand unless absolutely necessary due to your client's ongoing care. If your demand is based on new and important information not previously known to the defense such as a recent procedure or evaluation, get that recently acquired information to the defense *outside of the mediation privilege* as soon as you have it.

4. Arguing the "lid is off" for the first time at mediation

Now is the time to discuss the elephant in the room. Many of the tactics discussed in this article may have at their core the intention of exposing the carrier to extra-contractual liability for failing to settle a given case at or within the applicable policy limits. While it is beyond the scope of this article to analyze the issue of when a "lid is off" or is not off a particular policy in a particular case, it is important to point out that any attempts to use mediation to accomplish that goal are likely thwarted by the mediation privilege and protections under the California Evidence Code concerning communications made at mediation.

Because items such as briefs, and events such as discussions at mediation, are not going to be of value to you in any subsequent suit for extra-contractual liability, mediation is not the appropriate venue to attempt to place a carrier in a position where there is the potential for extra-contractual liability. Bearing this fact in mind, it is suggested that if you

believe you have a case that subjects the carrier to extra-contractual liability, that fact should be reflected by a demand and evidence submitted to the carrier well in advance of mediation. Waiting for the mediation to spring a demand over policy limits because you believe the "lid is off" is one of the fastest ways to stop a mediation before it begins. The reason is based on how carriers assess their risk of extra-contractual exposure.

It bears remembering the extra-contractual liability is just that: it is exposure *of the carrier* to liability *outside of the risk* it took on when it wrote the policy for its insured. The determination of whether there is such risk and extending authority for that risk is normally made by a group within any given insurance company *outside* of the typical chain of command. In other words, if you really believe there is extra-contractual liability and want money for that potential exposure, it will take time to have the right people review and analyze the carrier's potential exposure to that risk. Thus, springing an extra-contractual demand for the first time on the adjustor who shows up for your mediation has an extremely low probability of netting you any extra-contractual money for the possible risk.

Some carriers in the face of your extra-contractual demand will instruct the adjustor to not negotiate and bring the file back for further analysis. That's a waste of money for the mediation. On your best day, an adjustor will stay and negotiate with the authority they have (which will not include a premium for extra-contractual risk given the last-minute demand for same). Because the determination of extra-contractual risk is outside the scope of work of the adjustor at your mediation, it is unlikely you will obtain any premium (i.e., more money) because you have made an extra-contractual demand, if you do it for the first time at mediation.

All of this does *not* mean that extra-contractual claims are not real, or not valuable. In every case I have mediated where extra-contractual money has been in play and offered, the plaintiff's attorney has always demanded it before mediation and orchestrated the mediation to allow the necessary decision makers to be present. For you to have a good faith chance at obtaining a settlement inclusive of extra-contractual monies, consider the suggested best practice below.

Suggested best practice: If you truly believe the carrier is in a position where extra-contractual liability is a real possibility, then consider a different tactic than showing up at mediation for the first time demanding extra-contractual money.

Well in advance of mediation, a demand for extra-contractual money accompanied by the timeline or documentation you believe supports such a demand should be in the hands of the defense. "Well in advance" is recommended to be weeks before mediation at the earliest. Then, there should be assurances from the defense that someone with authority to consider the carrier's extra-contractual issues should be present and prepared to meaningfully participate. You might even consider it a pre-condition if you and your client believe it would be in your interests. Often the defense will engage separate counsel to advise on the issue. That counsel should also attend the mediation.

3. Threatening to bring in another lawyer to try the case

If you have been successfully working up the case and generated good respect for your abilities as a lawyer throughout the litigation, then probably you have garnered respect from your adversary. That respect can translate into dollars to settle your case. You hurt yourself with a threat of bringing in someone else to try the case during the mediation.

If you truly feel outgunned, or outlawyered by your adversary, or if the case is beyond your expertise or capacity to handle on your client's behalf, then of course you and your client should consider teaming up with a more seasoned trial lawyer. The issue is the timing of making such a threat and the threat itself, not the notion of teaming up. Don't do it at mediation. It makes the defense think you perceive a weakness in yourself or your case. It can have the *opposite effect* with your opponent.

I have had defense interests, when the threat has been communicated, say "Good. Let's get (insert name of famous trial lawyer here) in the case. I've dealt with them before. At least they know what they are doing." Then the mediation goes off the rails.

Lastly, many of those famous trial lawyers who get named at mediation take umbrage at their names being bandied about at mediation to try to extract better settlements. Many seasoned claims adjustors, particularly on big exposure cases, will know the name of the lawyer of whom you speak, and even his or her cell phone number. If they reach out to that lawyer after you threaten to bring him or her in the case and he or she has never heard of you and/or your case, you have hurt your reputation and your case even more. That has happened!

Suggested best practice: Team up on cases when you feel it is in your client's best interest, but never threaten to bring in another lawyer to try the case for the first time at mediation.

2. Being unprepared to deal with lienholders

A personal-injury settlement is algebra. We have to solve for "x" which is the amount the client gets in his or her pocket. In order to solve for "x" we need to know the total settlement, the attorney's fees and costs, and the amount needed to satisfy lienholders. The trickiest variable is the amount of the liens.

The four liens that are most common are 1) Governmental liens such as Medicare/CMS and Medi-Cal/DHCS; 2) Workers' Compensation liens; 3) Private health insurance lienholders such as Kaiser, Anthem, etc.; and 4) Contractual liens by providers or factoring companies normally acquainted with the plaintiff's attorney. Each poses its own degree of difficulty in handling.

Typically, every plaintiff's attorney's office has a person or department that wrestles with lienholders. Governmental and private health insurance lienholders tend to be more knowable before mediation as reductions are statutory or based on common fund, etc. Therefore, for purposes of this article we will leave those aside, and instead focus on how to handle the workers' compensation lien and contractual lien holders.

The workers' compensation lien can be asserted with a lien, or a complaint-in-intervention. For purposes of mediation, having the lienholder either participating or on an active standby will allow the conversation about satisfying the lien to run smoothly in most cases. The majority of lawyers who represent the lienholder in workers' compensation cases are specialists and are going to be prepared to have an open conversation about what they can do to work with you.

A mediator with experience in cases involving workers' compensation cases can be invaluable in that "sub-negotiation" on the plaintiff's side of the negotiating table. Generally, it is better to try to work with the lienholder than not in the vast majority of cases for many reasons beyond the scope of this article.

The trickier liens to deal with in mediation can be the contractual liens. With the *Howell v. Hamilton Meats* and *Pebley v. Santa Clara Organics* decisions, there has been an entirely predictable explosion of medical care provided on a lien basis. Unfortunately, it can be difficult at mediation to get an exact reading on how much money will be necessary to satisfy the lien claims of these providers during mediation. That difficultly then can make it challenging for the plaintiff to make a decision about settlement, as he or she does not know this variable. Understandably, many plaintiffs want to know the net recovery to them before being comfortable agreeing to a settlement.

Most mediators will not intrude in your discussions with these lienholders. But if there are problems you have in dealing with lienholders, there are things a mediator can do to help, among them a mediator's proposal.

In situations where you cannot get an accurate enough or secure enough read on how much contractual lienholders will accept as payment in full, consider allowing the mediator to do a proposal. In this way, you can approach the lienholder with your proposed figure to pay them in order to secure the best net recovery for your client. Because the plaintiff has not committed to the settlement (he or she is mulling over the proposal figure) the lienholder is likely to be as reasonable as possible to help make a settlement happen when approached with a proposal rather than a settled case. The key is to be open with the mediator if you are having issues with the lienholder, and then enlist his or her help to maximize the recovery to your client.

Suggested best practice: Do all you can to be prepared with an approximate price for medical liens to share with your client. If you are having issues with providers, share these issues with your mediator in confidence and brainstorm possible solutions. Experienced mediators have seen these issues countless times and may offer helpful suggestions, among them a mediator's proposal.

1. Going the wrong way to start mediation

I have saved the most toxic mistake for last. It is so frequent now that I have nicknamed it "Wrong-Way Mediation." It is the biggest reason within the plaintiff's lawyer's control that causes a case not to settle before the mediation really begins. My odds of settlement on wrong-way mediation day are 10% or less. Russian Roulette has similar odds.

Some may be asking, "What is wrong-way mediation?" If you have to ask, I am loath to tell you for fear you might try it someday. Please don't.

"Wrong-Way Mediation" begins with a demand that is substantially higher than the last number the defense heard when they agreed to mediation. Suppose you have a case where you asked for the $1,000,000 policy limit. You get a $25,000 offer. You counter at $900,000. You get a response of $40,000 and an invitation to mediate. You accept.

You submit a mediation brief on the day of mediation, and for the first time make a demand of $3,000,000, and state in your confidential brief that "the lid is off" and drop a last-minute life care analysis on the table to justify your starting demand.

The odds of getting an offer in the first two hours in this situation are low, and the chance of settlement at mediation is minimal. Why?

It's game theory in action. It is well understood that our instinct and our rational mind will lead us to cooperate when we feel the other side is cooperating, but also compete when we feel the other side is competing. With that in mind, how will the defense take a $3,000,000 start after the pre-mediation negotiation where you left off at $900,000?

Not well is the short answer. A lucky mediator will have a seasoned adjustor who will ignore the $3,000,000 start and the last-minute life care analysis and negotiate by starting with saying they will offer $50,000 if there is a counter under the last demand of $900,000. That's a lucky mediator. You can then treat that as a bracket and bracket back, suggesting your playing field. That is how a crafty mediator can possibly sidestep and settle the 10% of wrong-way mediations!

Most of the time however, the defense adjustor won't bid, or will lower their offer! Why? Because wrong-way mediation moves are the ultimate competitive move, and every instinct will tell the defense to compete. The most extreme form of competition would be to "vote with your feet" and leave without engaging. A tit-for-tat move would be to lower the last offer from $40,000 to $15,000 (reducing offer by roughly one-third after you triple your demand).

I cannot stress enough how detrimental this tactic is to get your case

settled no matter what your goal. Hypothetically, in our imaginary case, if your goal for settlement was a range of $600,000 to $750,000.00, you will never know if the adjustor would get into that range by starting the process with a wrong-way move to $3,000,000. If your goal was to get over the policy of $1,000,000, you will never do it with a wrong-way move for the first time at mediation. You needed to make such a demand well in advance.

If your goal was to see the defense's top offer for the case, you won't see it at mediation with a wrong-way move like this without looking dreadfully weak and making giant moves off $3,000,000. Lastly, if you were trying to "pop the lid" with your demand, you can't do that at mediation either, because it's all confidential. In other words, there is no strategic or tactical advantage to wrong-way mediation. It does not work. The cases that do settle on wrong-way mediation day do so *in spite of* the wrong-way start, not because of it.

Perhaps there are changed circumstances to your case that you believe justify the wrong-way move? You may be right. But if that is true, then don't make your belief known for the first time at mediation. As discussed earlier, well in advance of mediation, make your extra-contractual demand, support it with whatever new information there is, and plan to move your mediation date if the defense is not prepared to engage with you given the new information.

If you sense the passion with which I write this section, you are perceptive. A mediator's job at its essence is to show the plaintiff the best possible settlement number he or she can get in what feels to them like a long and slow process. Oftentimes your client was injured years before the mediation date, and patiently has waited for what feels like an eternity to finally have a chance to feel like a human being whose harms and losses are heard and acknowledged by a neutral party. Then the real work begins setting about presenting each side's case to the other, their strengths and weaknesses, in order to try to get to a meaningful negotiation and potential settlement.

A wrong-way mediation day almost always short-circuits that job. The mediation becomes about the wrong-way start and people get furious on both sides over the gamesmanship, and the mediation stops being about the plaintiff's injuries. The case is almost always not settled, but more importantly, the plaintiff is left in a worse position than before the mediation, and leaves upset overall.

Suggested best practice: Never, ever do wrong-way mediation in a case you actually want to try to settle at your mediation. If you must increase your demand from the last number heard by the defense when they agreed to mediate due to changed circumstances, do it well in advance of the mediation, provide reasoning or evidence to support your move, and be prepared to reschedule your mediation if that new information causes the defense to need to re-evaluate.

Conclusion

If you have read this article and don't recognize anything you are doing in mediation, then it does not appear you are making any unforced errors in your mediation preparation and technique. If, however, some of the recommended "don'ts" are standard procedure for your mediations, and you are not happy with your results at mediation, I hope that I have given you some things to think about. Maybe give some of the suggested best practices a try to see if you and your clients are happier with mediation. I'm always happy to hear your viewpoints, pro or con, at robert@tessiermediation.com.

Tessier

Robert M. Tessier was admitted to the California bar in 1986 and has been a mediator since 1994. He has successfully mediated over 4,000 litigated disputes in the areas of personal injury, product liability, professional negligence, real estate, business and partnership disputes, trust and estates, and Fair Debt Collection matters. He has earned the respect of his peers through an AV rating for professionalism and integrity in his practice. He is a Distinguished Fellow of the International Academy of Mediators, a Super Lawyer since 2014, and has had the multi-year honor of being named one of the Daily Journal Top 50 Neutrals for the State of California. He has been affiliated with Judicate West since 2008 and mediates throughout California.

A TIMES INVESTIGATION

Tom Girardi's epic corruption and a shrouded legal specialty

Case of disgraced lawyer sheds light on world of private judges

BY HARRIET RYAN AND MATT HAMILTON

The settlement Tom Girardi reached with a drug company in 2005 was characteristically large and righteous: some $66 million the famed Los Angeles trial attorney won on behalf of patients who said a diabetes medication caused liver failure and other maladies.

At Girardi's suggestion, a nationally renowned mediator was appointed to ensure proper distribution of the funds. For overseeing the settlement, retired California appellate Justice John K. Trotter Jr. and his private judging firm, JAMS (formerly known as Judicial Arbitration and Mediation Services), received a $500,000 cut.

Yet in the years that followed, Girardi diverted money Trotter was hired to safeguard for purposes that were highly questionable and even, in the recent assessment of one federal judge, "a crime."

Girardi sent $750,000 to a jeweler for what Bankruptcy Court records show was the purchase of an enormous pair of diamond earrings for his wife, "The Real Housewives of Beverly Hills" star Erika Girardi. He dipped into the settlement account again and again for supposed case expenses, sometimes writing multiple seven-figure checks to his law firm in the same week, according to the records.

Ultimately, he took more than $15 million — about 22% of the settlement — for what he described as "costs," according to a check registry filed in court. Legal experts told The Times the pattern of withdrawals indicated fraud.

Girardi's firm collapsed a year and a half ago amid evidence that one of the most respected lawyers in California had stolen from clients for decades — the largest legal scandal in state history.

A Times investigation drawing on newly released internal firm records found that his unethical practice depended on private judges, who occupy a secretive corner of the legal world. Girardi's reliance on them raises questions about whether there are enough safeguards in this highly confidential and largely unregulated industry to protect the public from predatory attorneys.

Retired judges, including Trotter, played prominent roles in administering large settlements from which Girardi is accused of stealing money. Several worked for Irvine-based JAMS, the world's largest private mediation and arbitration company.

Girardi paid private judges at JAMS and elsewhere up to $1,500 an hour to work on mass tort settlements that often involved hundreds or thousands of clients and tens of millions of dollars, according to court records. When pressed about missing funds, he often invoked the jurists' impressive credentials. The willingness of the former judges to stand by Girardi in court — and sometimes join him at his lavish junkets and boozy parties— enhanced his aura of invincibility.

In some instances examined by The Times, it is not clear that the retired judges knew Girardi was using them as a shield to fend off scrutiny, such as a 2018 letter in which he blamed delays in paying clients on Trotter's heart problems. But in others, there is evidence the retired judges were aware of misconduct allegations and assisted him anyway.

In 2001, a former judge helped Girardi improperly siphon $3.5 million from a settlement for workers of Lockheed Corp. (which later became Lockheed Martin Corp.) by signing a sham "order" to release the money to him, according to a copy of the document and correspondence from a bank executive filed in court.

In 2014, a retired state Supreme Court justice then at JAMS was drawn into an attempt to mislead cancer survivors about more than $1 million missing from their settlement. Girardi's firm, Girardi Keese, told clients that the former justice had instructed the firm to "hold back" the money. The claim was false, but the jurist did not inform the clients or the trial court and fought a subpoena for months before finally being forced to testify under oath. Only then did he disclose that Girardi was lying.

Despite the wide power of private judges in the legal system, no government agency specifically monitors or polices their conduct. Retired jurists often agree to abide by provisions of the Code of Judicial Ethics when working as a referee, special master or similar position, butthey do not fall under the purview of the Commission on Judicial Performance, the state agency that investigates the conduct of active judges, an agency attorney said.

Some of the retired jurists who worked with Girardi have died. None still living who were approached by The Times agreed to be interviewed. Trotter, 88, has continued to wield influence. Until recently, he was the sole trustee overseeing the $13.5-billion trust for tens of thousands of victims of wildfires in Paradise and other Northern California communities.

"I believe I performed my assigned tasks in an appropriate and timely manner," Trotter said in a written response to questions about his relationship with Girardi. In a second statement, he added that he did "not know when, how or why [Girardi] morphed from an apparent capable, ethical lawyer to what he is today."

"The problem isn't mass torts or private judging, it is Mr. Girardi," he wrote.

Girardi is not in a position to provide answers. He was diagnosed with Alzheimer's disease last year and is in a court- ordered conservatorship overseen by his younger brother. His court-appointed lawyer, Rudy Cosio, declined to comment.

Once cosseted in a sprawling Pasadena mansion, the 83-year-old Girardi now resides in a Burbank nursing home, dependent on family for financial support. In a court filing, his brother, Robert, wrote that Girardi takes medication for dementia and that his "care needs are such that he needs to be at a skilled nursing facility."

The state Supreme Court stripped Girardi of his law license in June, and he and his firm are the subject of ongoing bankruptcy proceedings.

The Lockheed litigation cemented Girardi's reputation as an attorney willing to take on big corporations.

Beginning in the early 1990s, he represented hundreds of Lockheed employees who claimed they had been poisoned at the aerospace giant's Burbank plant. The litigation was complex, with clusters of workers suing Lockheed and a host of chemical companies over a decade. Records from the litigation show that Girardi wrested more than $128 million from the companies.

"His [legal]skills were phenomenal," said Danny Barnes, a Girardi client who started working at Lockheed as a teenager and developed cancer at 27. "The bad part was he didn't do the money right."

Though the law firm was called Girardi Keese, it was owned and controlled by Girardi alone. He brought on retired judges affiliated with JAMS, with the assignment of fairly allocating the money among Lockheed workers. To avoid perceived ethical conflicts, it is common for plaintiffs' lawyers to hire outsiders to decide how much of a lump settlement each client should receive.

One retired judge working on Lockheed was the late Jack Tenner, who had spent 10 years on the L.A. Superior Court bench and was widely admired for his civil rights activism. Tenner, who was white, worked to integrate firehouses and end discriminatory real estate practices. When Black friends, including future L.A. Mayor Tom Bradley and baseball legend Frank Robinson, wanted to buy homes in white neighborhoods with racist deed covenants, Tenner posed as the buyer and transferred ownership once the sale went through.

He was close to Girardi, officiating at his second marriage in 1993, and was one of three JAMS judges, including Trotter, who helped arbitrate Girardi's most famous case: the $333-million settlement he won in 1996 for residents of the Mojave Desert town of Hinkley. That case inspired the film "Erin Brockovich."

After the legal victory, which delivered at least $120 million to lawyers involved, Girardi and a colleague organized a celebratory Mediterranean cruise and invited Tenner, Trotter and other current and former judges. As The Times then reported, most of the jurists eventuallyrepaid Girardi, but questions about the propriety of the trip lingered.

By the time of the cruise, Tenner had worked with Girardion the Lockheed cases for about five years, and clients and fellow attorneys were growing upset at the lack of transparency and the pace of payouts, according to court records andinterviews.

As with many cases Girardi handled, his Lockheed clients were of modest means and education, and as time went on, many were terminally ill from cancer.

"People were one foot in the grave and one foot out and trying to get something," recalled Mildred Davis, whose husband, Willie, was diagnosed with cancer after a career at Lockheed. She suspected that Girardi saw his clients as easy marks who, in their desperation, would accept far less than they were owed. Girardi, she said, would reason, "If I give them $50,000 or $25,000, they are going to be OK, because they never had that kind of money."

"It upset my husband that [Girardi] felt that he was so dumb, stupid, that he would just be quiet and sit down," she recalled. Her husband collected some money but not all he believed he was due, she said. He died in 2014.

Tenner remained firmly in Girardi's corner. In 1998, after some clients filed complaints with the State Bar and others considered lawsuits, the retired judge sent a letter to Lockheed workers in which he wrote that he and another JAMS judge "want to compliment the law firm of Girardi and Keese for its undying efforts on your behalf."

The effusive letter did not mollify discontent, and clients continued pressing Girardi to explain what he had done with their money. A partial accounting in 2000, later described in court papers, only deepened their sense of alarm about the settlement and Tenner's oversight of it.

Millions of dollars had gone to companies and lawyers that had no clear ties to the case and a host of individuals with dubious-sounding names such as K. Ernest Citizen, Giovanni Medici and Lee Marvin, according to court filings. One line item showed $450,000 withdrawn for an "expert witness" fee. It bore the cryptic notation "Confidential (Subject Matter attested to by Judge Tenner)." When pressed for documentation, Girardi refused to provide any.

Tenner died in 2008. The Times did not find any records in which he explained his actions.

The questions about Girardi's conduct were significant enough that a settlement reached in 2000 with two Lockheed-related chemical companies included constraints on his access to funds. The money was placed in an escrow account, with withdrawals requiring the approval of lawyers for the chemical companies and a mediator.

But in early 2001, Tenner helped Girardi circumvent those safeguards, according to court recordsoutlining the previously unreported episode. Tenner signed an "order to transfer funds" drawn up by Girardi on what appeared to be L.A. Superior Court letterhead; it directed Comerica Bank to release $3.4 million to the lawyer. A bank officer sent the money to Girardi, along with $175,000 in interest. Two days later, Tenner signed a second "order" for an additional $3.6 million, but the bank balked, court filings show.

After the missing funds were discovered six months later, Girardi claimed that he had paid that money to clients, but he would not provide copies of the checks.

"Judge Tenner had no authority to issue any such order, the release of the funds was in direct contravention of the settlement agreements," Jeffrey McIntyre, an attorney for Girardi's clients, wrote in a 2002 court filing. He asked a Superior Court judge to bar Girardi from using Tenner "to make any purported 'Orders' " going forward. The outcome of that request is unclear.

Tenner continued supporting Girardi in the face of embezzlement claims. In a 2003 letter to Lockheed clients, Tenner wrote, "You should also know that all settlements to the workers and all legal fees have been approved by me."

He added, "In my many years as a lawyer, my many years as a judge and my many years as a retired judge, I have never seen the legal effort put forth on behalf of clients like the Girardi firm has done."

To this day, Lockheed clients say they have never received full payment, and Davis, Barnes and others have filed claims in the pending Girardi bankruptcy case for compensation.

The clients were growing more suspicious by the day.

Girardi in 2011 had reached asettlement of more than $17 million with the manufacturer of a menopause drug called Prempro. Some of his 138 clients, all elderly cancer survivors, came to question his handling of the money and hired a former federal prosecutor who in 2014 demanded an accounting.

Girardi knew the cancer survivors were right; he hadn't paid them everything they were due, evidence that emerged in court later showed. But instead of fully compensating the women or opening his books to their lawyer, he sent themto retired state Supreme Court Justice Edward A. Panelli.

He had earlier tapped Panelli, a JAMS judge, for what his firm told his clients was the important and difficult work of allocating the settlement. Now he and his firm seized on that role to explain why somecancer survivors had received less than expected. In a letter to the women's attorney, a Girardi Keese employee revealed for the first time that the firm had withheld 6% of the settlement — about $1 million — and claimed it was at the behest of Panelli.

"I am copying Justice Panelli on this letter and I suggest that we meet with Justice Panelli so that you can verify the 6% 'hold back' with him," wrote James O'Callahan, a lawyer at Girardi's firm. (O'Callahan died in 2019.)

Though California attorneys are required by law to provide an accounting within 10 days of a client's request, Girardi refused repeated demands, and the cancer survivors ultimately sued to get the financial records.

In response, Girardi turned again to Panelli. Girardi's firm filed court papers arguing that the lawsuit should not be decided by the assigned federal judge but transferred to a private arbitration overseen by Panelli. Girardi Keese asserted in a court filing that the retired judge had already been formally "appointed" and "has sole discretion to make awards in the underlying ... ligation." The filing reiterated the claim that it was Panelli, not Girardi, who had decided to retain $1 million.

A federal judge in L.A. called the argument that Panelli should oversee the case "clever" but rejected it in a decision that colorfully described Girardi's defense as "the Justice-Panelli-made-me-do-it argument."

What the clients and the federal judge didn't know at the time was that almost everything Girardi Keese said about Panelli was a lie. Evidence that emerged later established that no court had appointed him in the cancer survivors' case, and he had never instructed Girardi Keese to hold back any money, let alone $1 million.

The claim that Panelli had vast and sole authority over the settlement was also exaggerated. Panelli had spent "approximately 20 hours" on the case, according to a magistrate judge's analysis. He met with only two or three of the cancer survivors and had merely "rubber-stamped" payouts already decided by Girardi Keese, according to the cancer survivors' attorney.

At the time, Panelli was working on several cases for Girardi, and the two men had developed a friendship and sometimes socialized. The retired justice seemed unwilling to testify against his friend. He and JAMS fought subpoenas for months, with Panelli arguing in a court declaration that he was too busy to submit to questioning: "With regard to the next eight weeks, with rare exception, I am scheduled to be either engaged in family caretaking obligations, on vacation, or working on previously set matters."

Finally forced to testify in 2015, Panelli gave up Girardi's lie.

"Did you authorize Girardi Keese to hold back any portion of the settlement funds from the plaintiffs?" an attorney for the women asked.

"No," Panelli replied.

By then, the cancer survivors had become suspicious that Panelli was paid excessively for the limited work he had performed. JAMS billed Girardi Keese about $78,000 for Panelli's time, but records from Girardi's bank, filed in court, showed another payment: a $50,000 check to Panelli personally. Combined, those payments wouldamount to an hourly rate of more than $5,000.

Asked under oath to explain the personal check, Panelli replied, "I don't know."

"Did you ask them why they paid you directly?" a lawyer for the women pressed.

"No," Panelli answered, according to testimony excerpted in court papers. The full transcript was confidential.

After the deposition, Panelli did not work with Girardi again. Now retired, Panelli, 90, declined to answer questions submitted in writing, including whether he had reported the lawyer to the State Bar or other authorities.

But in a statement, he said he had always complied with ethical guidelines established by JAMS and was not swayed by his socializing with Girardi.

"My attendance at any such event never affected my integrity as a lawyer or my impartiality as a jurist or neutral," Panelli said.

The cancer survivors eventually obtained law firm records that showed Girardi had removed millions of dollars of client money months before he informed the women that the settlement funds had arrived. A forensic accountant who examined the records found evidence of a "Ponzi scheme" in the settlement account, according to court filings. The case settled on confidential terms in 2016.

"We finally got him. This time we got the kahuna," Girardi crowed in 2006 to the audience of his syndicated weekly radio show, "Champions of Justice." "One of the finest justices the Court of Appeal has ever had."

The honored guest was Trotter or, as Girardi informed listeners, "a man of great principle," who, having left the bench, was "the greatest" of the "great men and women at JAMS."

The praise was so over the top that Trotter, when finally given a chance to speak, joked, "After an introduction like that, I would imagine that you would do very well in front of me the next time you appear."

As it happened, Trotter at the time was handling one of Girardi's cases: an approximately $66-million settlement with the maker of the diabetes drug Rezulin. The terms were confidential, but Trotter's role had been spelled out in a 2005 court order appointing him "special referee" for the settlement. Under the order, his duties included "review and approval" of payouts to each of the approximately 4,300 clients, as well as the legal fees due Girardi and his co-counsel and any expenses incurred by those firms in preparing the case.

The L.A. Superior Court judge who signed the order had every reason to trust Trotter. A widely admired Orange County plaintiffs' attorney in the 1970s, Trotter had served for nearly a decade as a judge, first in Superior Court and later on the state appellate bench. He surprised some in the legal community in 1987 by stepping down to join JAMS, a six-judge mediation firm started by a friend.

In the years that followed, Trotter helped transform JAMS into a national and, eventually, international powerhouse with a pivotal role in the judicial system. The company Trotter built now employs more than 400 arbitrators in 29 locations, and many important legal disputes, particularly those involving corporations, play out not in public courtrooms but behind closed doors at JAMS. (The Times has used JAMS to resolve disputes.) Although he retired from JAMS five years ago, Trotter said he remains a shareholder. A spokesperson for JAMS said he stopped being a shareholder in 2020.

In the Rezulin settlement, the court made Trotter a gatekeeper for the funds. No money was to leave an escrow account at Comerica Bank except "as directed" by the retired justice, according to a court order. Yet almost all of the settlement — some $65 million — poured into a separate lawfirm account controlled by Girardi, according to internal Girardi Keese records that became public this year in bankruptcy proceedings.

Just overa month after he gained access to the money, Girardi wrote a check on that account for $750,000 to M.M. Jewelers. The family-owned store in downtown L.A. had created several pieces in the $15-million jewelry collection of Erika, his now-estranged wife, and the funds from Rezulin went to purchase a set of diamond stud earrings to replace a pair that had been stolen in 2007 from the couple's home, according to declarations from Girardi and a store owner that were filed in the bankruptcy proceedings.

"The diamonds were of exquisite quality and very large," Ared "Mike" Menzilcian recalled in the affidavit.

In a hearing this summer in L.A., the federal judge overseeing the Girardi Keese bankruptcy said the earring purchase "clearly was a crime."

"This was an embezzlement. This was a theft," U.S. Bankruptcy Judge Barry Russell said.

Though there is an ongoing federal investigation into Girardi's misappropriation of client funds, no charges have been filed.

Trotter said in a statement that he was unaware that Girardi transferred settlement money to a jewelry store.

Girardi categorized the purchase in internal firm records as a "cost," meaning a case expense deducted from the amount that went to clients. Put another way, Girardi was charging his clients for his wife's earrings. And there were other questionable withdrawals billed as "costs."

At various points over a 21-month period, Girardi removed money from the account for what he claimed were expenses, according to a check registry filed in Bankruptcy Court.

The checks, made out to the firm Girardi solely controlled, were for large sums and, with one exception, were for round numbers such as $4 million, $1 million, $500,000 or $100,000. They eventually totaled $14.3 million.

Experts who reviewed the court order and financial records at the request of The Times said there were numerous red flags.

"You are never going to see a round number like $1 million or $750,000, because the costs are never that way. They come with pennies," said Charles Silver, a professor at the University of Texas at Austin School of Law who specializes in civil practice.

He and others said attorneys usually deduct all or almost all of their expenses at the outset and not as Girardi did, with more than a dozen withdrawals spanning abouttwo years.

"It doesn't make any sense," said forensic accountant Steve Franklin, who had examined records in the cancer survivors' litigation. "They are treating it like a slush fund."

By comparison to the vast sums Girardi took, Trotter approved just $604,500 in cost reimbursements for a Pasadena law firm that partnered with Girardi Keese on the case and did substantial work preparing suits for trial, according to emails filed in Bankruptcy Court.

"How did this go for so long without being discovered?" asked UC Irvine Law School professor Carrie Menkel-Meadow, who has worked as a mediator and written extensively on ethics and mass tort settlements.

She and others said it is incumbent on anyone overseeing a settlement to demand invoices, receipts orother proof that costs are legitimate.

Asked to explain his handling of the Rezulin settlement, Trotter said in a statement that "questions regarding a 17-year-old case are difficult to answer with specificity," but he "did not in any way authorize nor know about the withdrawals you reference that Mr. Girardi labeled as costs."

"They appear to be Mr. Girardi's unlawful use of client funds and had nothing whatsoever to do with actual costs," Trotter said.

Whatever the oversight failures in Rezulin, the case brought Trotter further acclaim. The National Law Journal cited his work on the settlement in a 2011 article that declared him the country's "most influential" attorney in alternative dispute resolution.

Trotter and JAMS were also paid handsomely. Their $500,000 fee was not widely known before it was revealed this year in Bankruptcy Court, and its size has raised eyebrows.

During a hearing this summer, an attorney for Erika Girardi, Evan Borges, called the sum "very suspicious," adding, "I've never heard of such a thing."

JAMS confirmed receiving the fee in the Rezulin case but refused to provide invoices substantiating Trotter's work and declined to make executives available for interviews. The company did not answer questions submitted in writing but said in a statement that its retired judges "are expected to adhere to the ethical standards that they swore to uphold under oath."

In 2015, the year Erika debuted her lavish lifestyle to viewers of "The Real Housewives of Beverly Hills," her husband was negotiating settlements that would ultimately total $120 million for residents of a Carson neighborhood who claimed they got cancer and other maladies from polluted soil.

At Girardi's request, Trotter was appointed as special master to divide the funds secured from an oil company and a real estate developer among about 1,500 clients affected by the pollution at Carousel, a housing development north of the Port of L.A.

Years passed, but the settlements — one announced in 2015, another in 2016 — remained partlyunpaid, and clients complained. Chris Gutierrez, a public school teacher who had lived in Carousel since childhood, took to dropping by Girardi Keese's Wilshire Boulevard offices on his way home from work.

"I would be waiting there for like an hour, and they wouldn't give me the information," Gutierrez recalled. "I think they were irked I actually showed up."

It seemed inconceivable at that time that Girardi could be delaying payment because he was short on cash — one had only to watch his wife on "Housewives" to see the couple's opulent home and her designer clothes and personal "glam squad."

Girardi responded to clients' ire with a series of letters that pinned the blame for delays on Trotter, bankruptcy filings show. In April 2017, he told them, "We have now satisfied all the requests of the Special Master and, beginning next week, we will be issuing checks."

Months later, the funds still delayed, Girardi wrote again, emphasizing that Trotter, not his firm, was responsible for the holdup: "Every penny of the settlement was governed by him including the timing in which funds could be distributed."

More than a year later, Girardi floated a new explanation. Trotter, he wrote, had "a terrible heart condition and he has been unable to handle many of the issues."

A few days later, Girardi related supposed sickbed comments from Trotter.

"I did speak to his wife and asked if we could at least do a partial payment as soon as possible. She discussed the matter with him and told me that he said he gave consent," Girardi wrote, adding, "Mrs. Trotter thought that his heart condition would settle down and he would be able to have a meeting in about 30 days."

It is unclear what Trotter's physical condition was at the time or whether he knew of Girardi's letters to clients.

Within months, Trotter had a new job with enormous responsibility: serving as the trustee of the multibillion-dollar trust for Northern California wildfire victims. He declined to answer questions about the purported heart condition or other Girardi correspondence but said in a statement that his duties were limited to deciding the amount of a plaintiff's award.

"I had no authority or oversight and was not in any way involved with the timeliness or distribution of the money. Nor was I privy to Mr. Girardi's comments," he said.

On at least two occasions, Girardi sent partial payments to clients, saying Trotter had authorized him to pay out some but not all of their money, according to letters the clients submitted to Bankruptcy Court. Experts consulted by The Times said attorneys can hold back money earmarked for specific medical costs incurred by clients, but state law requires them to pay funds due to clients "promptly."

"I would be suspicious right away that there was some misappropriation," said Kevin Mohr, a professor at Western State College of Law who chaired the State Bar's Committee on Professional Responsibility and Conduct. "Whatever is undisputed, the client has to be paid."

The partial payments raised questions about how Trotter was apportioning money. Carousel residents said in interviews that the process seemed random, with little correlation between the settlement award and the time a client had lived in the neighborhood or the injuries claimed.

Regina Torrez, a court reporter and cancer survivor who had lived in the neighborhood for decades, said she had hoped Trotter's involvement would root out fraud and "correctly disburse the award." But she came away disappointed.

"I don't think they went through the applications and figured out how people were affected and what injuries they had," Torrez said.

Some appealed to Trotter, without success.

"They never responded to me," said John Parago, who wanted to detail for Trotter how he survived testicular cancer as a teenager. He wondered whether "they were just waiting for people to pass so they wouldn't have to pay us."

Carousel client Richard Fair sued in 2017 for an accounting. As he had in the past, Girardi tried to move the suit outside of court into private arbitration with a JAMS judge. In court filings, he contended that Trotter had jurisdiction because of his ongoing work in the settlement.

An L.A Superior Court judge rejected the proposal, but Girardi tried again months later, including in his request a copy of a letter to Trotter marked "Personal & Confidential."

"We would like you to set a date and time for a hearing in this matter," he wrote to the retired justice. There is no record in the court file of Trotter responding. The request was denied.

"My sense was that he felt Trotter would rule in his favor. I don't know why else he would want Trotter in there," said Fair's attorney, Peter Dion-Kindem.

Girardi repeatedly refused to turn over financial records showing what he had done with the Carousel money and continued to call upon Trotter to fend off the lawsuit. One of the allegations against Girardi was that he had bungled the $120-million settlements by leaving the funds for years in his firm's trust account, instead of in an interest-bearing account that could earn money for clients.

Trotter vouched for Girardi's handling of the money, writing in a 2019 declaration that "it would have been totally absurd to try to allocate interest to an individual plaintiff."

Experts consulted by The Times said the retired judge's reasoning was flawed. State regulations do allow attorneys to keep "nominal" funds in their firm trust accounts for a short period of time, with the interest going to the State Bar for distribution to nonprofits that promote public access to the courts.

But "there's no way that millions of dollars held for any period of time fits within this category. No way," said Jack Londen, a partner at Morrison Foerster who worked on the litigation that upheld the trust fund statute.

Trotter said in a statement that he stood by his original conclusion but conceded that at the time, he was "unaware of the allegations regarding Mr. Girardi's conduct."

"Had I known, my opinion would not have changed, but I certainly would not have engaged with him in any way," Trotter said in the statement. He blamed the State Bar for not catching Girardi but refused to say whether he had ever informed the agency of misconduct by the lawyer.

Fair died last year, before his suit went to trial. Scores of Carousel residents have joined hundreds of other Girardi clients in filing bankruptcy claims to try to recover some of the tens of millions of dollars they say are owed to them.

"We don't have a lot of sway," said Parago, one of the dozens of residents who submitted a claim. "We're the small people."

Last month, the Bankruptcy Court seized Erika Girardi's diamond earrings and said they would be sold, with the proceeds going toward those cheated by Girardi.

Those who have lined up for repayment include JAMS, which last year submitted a claim for an unpaid bill of $9,660.

State's chief justice calls for oversight of private judging

BY MATT HAMILTON AND HARRIET RYAN

The private judging industry needs stronger oversight, California's chief justice said, following a recent Times report on the role for-hire judges played in Los Angeles attorney Tom Girardi's suspected swindling of clients out of millions of dollars in settlement money.

In a statement to The Times, Chief Justice Tani Cantil-Sakauye called revelations about the conduct of the retired judges, including a former state Supreme Court justice, "shocking," acknowledging, "There are not adequate safeguards regarding the business of private judging."

For decades, Girardi paid well-regarded private judges as much as $1,500 an hour to help him administer mass tort cases involving thousands of clients. The Times described how Girardi traded on the names of these former jurists to deflect questions about missing money and how, in some instances, they aided his misappropriation of client funds.

In one settlement in which a former appellate justice was paid $500,000 to oversee the distribution of funds, Girardi managed to divert millions of dollars from a settlement account for questionable purposes. A downtown jeweler received $750,000 for what court records show was the purchase of diamond earrings for Girardi's wife, Erika, of "The Real Housewives of Beverly Hills" fame.

Retired jurists serving as arbitrators and mediators hold an increasingly important and powerful place in the legal system, but their work occurs mostly behind closed doors and is rarely scrutinized by outsiders. Sitting judges answer to the state Commission on Judicial Performance, but private judges are not subject to regulation by a specific government agency.

The State Bar of California theoretically has jurisdiction over private judges who maintain their law licenses, but the agency acknowledged Monday that it was "not aware of any prior investigations" of them. "There does not appear to be an overarching regulatory framework for private judging or mediation," the agency said in a statement.

Cantil-Sakauye, the chief justice, lamented the "multifaceted victimization of injured people" in the Girardi case. She did not offer a specific course of action to protect the public but suggested that lawmakers in Sacramento should take the initiative.

"I believe the Legislature is the proper authority to regulate the conduct of the mediators," said Cantil-Sakauye, who announced last month that she plans to retire when her term ends in January.

Some in Sacramento say they are prepared to act.

"If I'm reelected, there will be hearings, and there will be legislation," said state Sen. Tom Umberg (D-Orange), chair of the Senate Judiciary Committee.

He labeled The Times' findings "stomach-churning" and said, "It's pretty clear to me that something needs to be done."

Among legislative measures, Umberg floated the possibility of mandatory disclosure of past relationships by an arbitrator or mediator.

Girardi repeatedly drew on the high-priced services of retired jurists affiliated with Irvine-based JAMS, the nation's largest private arbitration and mediation firm. They included JAMS co-founder and former Chief Executive John K. Trotter Jr., a retired California appellate justice, and former state Supreme Court Justice Edward A. Panelli.

The Times described Panelli's role in a $17-million settlement Girardi secured for elderly women who alleged they got cancer from a menopause drug.

When some of the women suspected in 2014 that Girardi had not paid them all they were due, his firm blamed Panelli and said the retired justice had ordered them to "hold back" $1 million. The claim was false, but the jurist did not inform the clients or the trial court and fought a subpoena for months before finally being forced to testify under oath. Only then did Panelli disclose that Girardi had been lying.

Trotter also worked on settlements in which clients accused Girardi of stealing money. In a $66-million settlement with the maker of the diabetes drug Rezulin, Trotter was appointed in 2005 as the "special referee" overseeing the distribution of money to clients, as well as to Girardi and other lawyers on the case. In the years that followed, more than $15 million went to Girardi's jeweler, for the diamond earrings, and his firm, for supposed expenses. Experts who reviewed financial records for The Times said the pattern of payouts indicated fraud.

Panelli and Trotter declined interview requests about their dealings with Girardi. In statements, they said they had limited roles that they carried out ethically. Asked to address the chief justice's comments, JAMS (formerly known as Judicial Arbitration and Mediation Services) reiterated a previously issued statement that its roster of former judges "are expected to adhere to the ethical standards that they swore to uphold under oath."

The outgoing chair of the Assembly Judiciary Committee, Mark Stone (D-Scotts Valley), agreed that the private judges' dealings with Girardi were evidence of an unaddressed problem.

"The fact you have judges with long-standing relationships with an attorney like Tom Girardi and doing things to his benefit and their own personal benefit — there is not currently a structure to hold anybody in those circumstances accountable," Stone said.

Stone, who is retiring this year, said he was skeptical of a legislative fix to the problem, given opposition to previous proposed legislation to bring more transparency and public safeguards to the arbitration industry. Those measures, he said, were vigorously contested by corporations and business groups that favor the system that allows them to settle disputes out of public view, adding, "I'm not sure these ethical lapses bother them that much."

"Those are very, very difficult bills to get through the Legislature, because those who stand to benefit from the way the arbitration system works oppose us at every turn, and that is to the detriment of consumers," Stone said.

A longtime critic of the private judging industry, former Santa Clara University School of Law Dean Gerald F. Uelmen, said it seems reasonable to regulate the private judging industry, but advocates should expect strong opposition from sitting judges, some of whom see private judging — with its cushy salaries — as a retirement plan.

"After years of working ... for just barely reasonable compensation, when they retire, they kind of strike it rich, and they like it," Uelmen said. "A lot of them are eager to retire and move on to that richer realm — so I think part of the opposition will be from judges who want to do it and see it as a just reward for all their years of hard work."

Justice John K. Trotter's Response to Recent Los Angeles Times Articles

Recent articles in the Los Angeles Times criticized the role of Private Judging (Special Masters, Arbitrators and Mediators) and suggested it was somehow related to disgraced lawyer Tom Girardi misappropriation of funds. I was one of the Judges referenced in the article and while I cannot speak on behalf of others, I would like to provide important facts on the cases in which I was involved in order to set the record straight and clearly explain the role of a Special Master.

- In 2005 I was appointed Special Master on a case involving the drug Rezulin "with oversight of all aspects of the settlement process and review of the allocation process." At the same time and in the same order the Judge also appointed a Vice President of the Bank "to implement the distribution of the settlement funds as directed by the Special Master." The clear purpose of the two appointments was that I resolve the claims and the bank pay them. The article failed to include this important fact and wrongly asserted that I had responsibility for the distribution of funds when I in fact had no access to the bank account.
- The article also incorrectly stated that I was paid for the Rezulin work when in fact the payment went to JAMS. It omitted to say that those services lasted two years, involved the evaluation of over 4,000 claims and the apportionment of $66 million dollars in which JAMS staff and facility were used for the many hearings over that two-year period.
- Beyond mistakenly suggesting that the distribution of money was under the auspices or control of the Special Master, the article also failed to capture universal aspects of tort settlements:
    - that an "allocation" either in the form of a Jury Award or Settlement or determination of value by a Settlement Master is a gross sum paid to the plaintiff attorney and deposited into their trust account; and
    - That the attorney then deducts his/her fees, case specific costs, and in most personal injury cases, lien obligations, that net payment is the "distribution".

It appears all of Mr. Girardi's alleged misconduct occurred after money had been placed in his trust account. Neither the Trial Judge nor Settlement Master were intended to be monitors of an attorney's trust account. It should be noted that in a recent plane crash case (that was not tried by a Private Judge, but by a Federal Judge) allegations against Mr. Girardi were that after the settlement funds were deposited in his trust account, he inappropriately used them for his own purposes.

My criticism of the LA Times should not in any way be taken as support for Mr. Girardi's reported actions. I am terribly saddened by his alleged conduct and the stain it leaves on our profession. But it is critical that one man's illegal acts not tarnish the reputation of Alternative Dispute Resolution which provides a great service to the Courts, legal community and the public. The people who work in Alternative Dispute Resolution as Special Masters, Arbitrators and Mediators are essential in today's legal world and they do not deserve the derision shown by the Los Angeles Times misinformed articles.

Justice John K. Trotter (Ret.)

Justice John K. Trotter is a former Presiding Justice of the Fourth District Court of Appeal, a past president of the Orange County Bar Association, past president of the American Board of Trial Advocates (Orange County Chapter), past recipient of the Franklin G. West Award, and is one of the founding members of JAMS based in Orange County, California.