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Mediation and Negotiation of Difficult Cases

Indiana Continuing Legal Education Forum (ICLEF)

Mediation and Negotiation of Difficult Cases
December 6, 2022
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August 2020

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MEDIATION AND NEGOTIATION OF DIFFICULT CASES

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DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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MEDIATION AND NEGOTIATION OF DIFFICULT CASES

Agenda

8:30 A.M.	**Registration and Coffee**
8:55 A.M.	Welcome and Introductions *Lee C. Christie and Mark A. Metzger, Program Chairs*
9:00 A.M.	Mediation and Litigation *Michael P. Bishop, Lee C. Christie, Mark A. Metzger, Hon. Gary L. Miller*
10:00 A.M.	Negotiating Catastrophic Cases *Sarah Graziano, Michael B. Langford*
10:45 A.M.	**Coffee Break**
11:00 A.M.	Federal Court Settlement Conferences *Hon. Mario Garcia*
11:30 A.M.	Negotiating Medical Malpractice Cases *Caroline A. Gilchrist and Peter H. Pogue*
12:00 P.M.	**Lunch Break** ***(on your own)***
1:00 P.M.	Judicial Panel on Negotiations *Hon. Gary L. Miller, Hon. Randy J. Williams*
1:30 P.M.	Negotiating and Mediating Family Law Cases *Mark A. Glazier, Danielle L. Gregory, Melanie K. Reichert*
2:15 P.M.	Negotiating and Mediating Commercial Cases *A. Richard M. Blaiklock and Wayne C. Turner*
2:45 P.M.	**Refreshment Break**
3:00 P.M.	Ethical Considerations *James J. Bell*
4:00 P.M.	Worker's Compensation Negotiations *Robert J. Doyle*
4:30 P.M.	**Adjournment**

December 6, 2022

MEDIATION AND NEGOTIATION OF DIFFICULT CASES

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Lee C. Christie, Christie Farrell Lee & Bell, P.C., Indianapolis

Lee Christie is a partner with Christie Farrell Lee & Bell, and is a lifelong Indiana resident. He is passionate in representation, and takes pride in the relationships he develops with his clients. He has extensive trial experience in both federal and state court, and is a frequent lecturer on trial, mediation, personal injury, medical malpractice, trucking accidents, and settlement issues. Lee has represented thousands of clients who have been injured and has obtained settlements and verdicts as high as $30.5M. Lee is highly civically engaged with several Indiana organizations, including the Walker Foundation (founding board member and officer) and Indianapolis Bar Foundation (board member and officer), and is a patron of the YMCA. He is past president of the Lawrence Township Girls Basketball League and continues to work with youth in the inner city of Indianapolis.

Practice Area Focus: Lee's practice focuses on trucking collision cases, automobile accidents, wrongful death, and medical malpractice.

Mark A. Metzger, Metzger Rosta LLP, Noblesville

Mark Metzger is a founding partner at Metzger Rosta, LLP, where he practices in the areas of insurance defense, litigation and personal injury. He was born in Mattoon, Illinois, on August 30, 1962. He earned his B.S. degree, with distinction, his M.P.A. degree and J.D. degree, cum laude, from Indiana University. Mr. Metzger was admitted to the bar in 1989.

He is a member of the Indianapolis, Indiana State, and American (member, Insurance Law and Litigation sections) bar associations, the Defense Trial Counsel of Indiana and Defense Research Institute. He has tried over 70 jury trials to verdict as lead counsel. He has also been lead counsel in over 60 arbitrations. Mr. Metzger regularly serves as an arbitrator in matters related to his field of practice. Mr. Metzger also is a registered mediator, and regularly mediates civil cases.

Mr. Metzger has been a guest lecturer and panel chairman at numerous seminars with regard to his practice. He is also an adjunct professor at Indiana University-Purdue University Indianapolis.

James J. Bell, Hoover Hull Turner LLP, Indianapolis

James J. Bell is a partner with Hoover Hull Turner LLP and practices in the areas of criminal defense and attorney discipline defense. He also represents judges in ethics inquiries, attorneys in civil litigation and provides ethics advice to attorneys. He is listed in The Best Lawyers in America and was recognized seven times as one of the top 50 Super Lawyers in Indiana. James was the 2018 President of the Indianapolis Bar Association and is the past chair of the IndyBar Criminal Justice Section. James has served as Chair of the Indiana State Bar Association's Legal Ethics Committee and Criminal Justice Section. He is a former state court major felony public defender, former federal CJA panelist, and former member of the Indiana Federal Community Defenders Board of Directors. For six semesters, James taught professional responsibility as an adjunct professor at the Indiana University Robert H. McKinney School of Law. He is a regular contributor to The Indiana Lawyer and Res Gestae where he writes about attorney ethics.

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Named as an *Indiana Super Lawyer* in the area of litigation beginning in 2004, Michael Bishop concentrates his practice in the areas of mediation, arbitration, and probate and trust litigation. He is recognized by *Best Lawyers in America* in Alternate Dispute Resolution and Arbitration and Trust and Estate Litigation since 2006. In 2008, he was selected as a Member of the *American Arbitration Association National Roster of Neutrals*. Michael has an **AV Peer Rating** from *Martindale-Hubbell*. Michael received his Juris Doctorate from Indiana University Robert H. McKinney School of Law in 1980. Following graduation, he served as Law Clerk to the Honorable James E. Noland, United States District Court, Southern District of Indiana. Michael is a **Distinguished Fellow** of the International Academy of Mediators, **Fellow** of the *American College of Civil Trial Mediators*, Fellow of the *National Academy of Distinguished Neutrals*, and **Member** of the *Association of Attorney-Mediators*.

Mr. Bishop is a member of the faculty of the *Indiana Trial Advocacy College* and is the Chair of the annual Advanced *Civil Mediation Training course* in Indiana. Michael was a founding member of the IBA Settlement Week in 1986. He served as Chair of the ISBA ADR Section, was a member of the Board of Directors for Indiana Continuing Legal Education Forum, and is Past President to the Board of Directors for the Indiana Bar Foundation. Michael received the **"Excellence in Continuing Legal Education Award"** from ICLEF, its highest award of achievement for commitment to continuing legal education. Michael is also past President of the Sagamore American Inn of Court, where he continues to serve as one of the founding Benchers of the Inn.

A. Richard M. Blaiklock, Lewis Wagner, LLP, Indianapolis

Rich Blaiklock focuses his practice on representing individuals and businesses in variety of commercial areas, including contract disputes, shareholder/owner disputes, trade secret and non-competes, auto supply chain issues, business and real estate transactions, business succession planning, regulatory matters and commercial litigation. He has experience litigating multi-million dollar disputes, with trial and appellate experience in those disputes. He has experience representing manufacturers in stop-ship situations, and he has successfully obtained injunction orders preventing suppliers from termination ongoing product supply. Rich also represents the Indiana Department of Insurance, Patients Compensation Fund, in tort and coverage cases. He has written and published law review articles on corporate law, appellate practice, and constitutional issues.

Since 2009, Rich has been listed as an Indiana Super Lawyers©. In 2010 and 2013-2016 he was one of Indiana's top 50 Indiana Super Lawyers. From 2012-2017, Rich was recognized by the Best Lawyers in America® in the fields of Commercial Litigation and; Corporate Law. He is also Martindale-Hubbell Peer Review Rated AV.

Rich was honored as Co-Recipient, Defense Lawyer of the Year Award by the Defense Trial Counsel of Indiana in 2009 and in 2011, Rich was awarded the Indiana State Bar Association, Litigation Section's Civility Award.

Robert J. Doyle, Due Doyle Fanning & Alderfer, LLP, Indianapolis

Robert J. Doyle is a partner in the law firm of Due Doyle Fanning & Alderfer, LLP, in Indianapolis, IN. He was born in Gary, IN on November 26, 1959. Mr. Doyle is a member of the Indiana State and American Bar Associations, The Defense Trial Council of Indiana and the Defense Research Institute.

He is past President of the Worker's Compensation Section of the Defense Trial Counsel of Indiana, and has authored numerous articles on Tort, Insurance and Worker's Compensation issues in the State of Indiana. Mr. Doyle serves as a Mediator and speaks to groups across the state regarding Indiana Worker's Compensation.

Hon. Mario J. Garcia, Magistrate Judge, United States District Court

The Honorable *Mario Garcia* was sworn in as Magistrate Judge of the United States District Court for the Southern District of Indiana on April 5, 2021. Judge Garcia was appointed to a new magistrate judgeship created for the Southern District of Indiana by the Judicial Conference of the United States. He is the first judge of Hispanic heritage to serve the Southern District of Indiana.

Judge Garcia is a 1995 graduate of Ball State University, where he received his Bachelor of Arts degree in criminal justice and criminology. He studied law at Indiana University School of Law – Indianapolis, where he graduated in 1999.

Upon graduation from law school, Judge Garcia joined the law firm of Brattain & Minnix (later known as Brattain Minnix Garcia). He became a partner in the firm in 2008 and eventually served as its Managing Member. Judge Garcia is a registered civil mediator as well. Throughout his 21+ year career as an attorney, Judge Garcia gained extensive courtroom experience in both civil and criminal law, appearing in thousands of hearings in Indiana's federal and state courts. Judge Garcia was a member of the Southern District of Indiana's Criminal Justice Act panel, through which he represented indigent clients. He also provided pro bono services for 10 years to participants in the District Court's Re-Entry and Community Help (REACH) Program, which helps individuals re-entering society after incarceration obtain access to housing, employment, and public assistance programs.

Judge Garcia previously served on the United States Sentencing Commission's Practitioner's Advisory Group as the Seventh Circuit Representative and currently serves on the District Court's Local Rules Advisory Committee for the Southern District of Indiana. He regularly volunteers throughout the greater community, including for the Alzheimer's Association Greater Indiana Chapter. He served as a Trustee and Vice Chairman of the Board of Trustees for The Orchard School and Member of the Board of Directors for La Plaza, Inc. (formerly The Hispanic Center, Inc., where he served as Board Chairman). He also served as Chairman of the Board for the Indiana Federal Community Defenders, Inc.

Caroline A. Gilchrist, The Mediation Group, LLC, Indianapolis

Caroline Gilchrist has a unique combination of mediation experience in both civil and family law. Caroline completed one of the first family mediation trainings offered in Indiana in 1987, followed by civil mediation training in 1993. For over twenty-five years, Caroline has been a trial attorney with her primary focus in the area of medical malpractice and personal injury. Her medical malpractice experience includes both defending healthcare providers and, more recently, representing patients as a partner in the firm of Baker & Gilchrist, since 1999. Caroline has also served as a Medical Review Panel Chair in medical negligence cases.

Caroline has been ICLEF's primary trainer for the forty (40) hour Basic Family Mediation Training since 1999, training hundreds of family mediators. For over thirty years, mediation has always been a regular part of her practice. Caroline has mediated family law cases, medical malpractice cases, personal injury, and a wide variety of civil issues. Her ongoing dream and goal has been to transition from full time trial lawyer to mediator.

Caroline has been named as a Super Lawyer in the Indianapolis Monthly every year since 2009. She has also been named as a Top 50 Indiana attorney for 2020 and 2017 and a Top 25 Women Attorneys in Indiana from 2016 through 2020 by Indianapolis Monthly. Caroline has consistently received the AV preeminent rating from Martindale-Hubbell. Since 2017, Caroline has been recognized by the National Association of Distinguished Counsel, top 1% and by Best Lawyers since 2014. Caroline graduated from Indiana University School of Law, Bloomington, in 1982. While in law school, she served as a note editor on the Board of Editors of the Indiana Law Journal.

In addition to being the primary trainer for the Family Mediation Training, Caroline has been a participant in numerous other continuing legal education presentations relating to both family and civil mediation, including the following: "Advanced Mediation Training Seminar", ITLA, 2013, 2011; "How to Handle the Difficult Client in Mediation", IBA Women's Bench Bar, 2009 and ICLEF, 2004; Case Law Update, ICLEF, 2004; "Mediation: Common Mistakes, Ethical Issues", ICLEF, 2006: "Successful Mediation: A Practitioner's Guide to Mediation Preparation," ICLEF, 1994; "Advanced Family Mediation Training," The Indiana Lawyer, CLE Division, 1996; and, associate trainer for Civil Mediation Basic Training, February 1998. Caroline mediated for the Department of Education, Special Education Division, for several years. She has been a speaker on the subject of negotiation and mediation techniques for a variety of groups. She has also been a speaker in numerous seminars over the years relating to the area of medical malpractice, including, "You Won/Lost the Medical Review Panel, Now What?", ITLA, 2017 and "Inside the Indiana Medical Review Panel Process", IBA, 2010.

Mark A. Glazier, Cross Glazier Reed Burroughs, PC, Indianapolis

A partner in the firm, *Mark Glazier* is a lifelong resident of Indianapolis where he graduated from North Central High School. Mr. Glazier received his undergraduate degree from Indiana University in 1990 with a double major in Economics and History. He earned his law degree from Boston University School of Law in 1993 and was admitted to the Indiana Bar in 1993 and the Illinois Bar in 1994. Mr. Glazier is a Fellow of the American Academy of Matrimonial Lawyers and is a Certified Family Law Specialist - Family Law Certification Board. He is also a registered domestic relations mediator and trained collaborative law professional. Mr. Glazier has lectured extensively to other attorneys on a wide variety of family law issues. Mr. Glazier is a member of the American, Indiana, Hamilton County and Indianapolis Bar Associations, and he is a former chair of the executive committee of the Family Law Section of the Indianapolis Bar Association. Mr. Glazier has been named a "Super Lawyer" in Indianapolis Monthly magazine each year since inception of the honor. An Eagle Scout, he remains active with the Crossroads of America Council of the Boy Scouts of America. Mr. Glazier and his wife have four children and reside in Carmel.

Sarah Graziano, Hensley Legal Group, PC, Fishers

Sarah Graziano was born and raised in Milwaukee, Wisconsin, but has called Indiana her home since graduating from Valparaiso University School of Law, with honors, in 1999. Sarah began her career focusing on litigation for a well respected defense firm in Indianapolis, but she quickly realized that her true focus was to help people who have disputes with corporations, insurance companies and the like. Since 2002, Sarah has focused her practice on helping individuals who have been injured at the hands of others. In addition, she has helped individuals with employment matters, including discrimination, wrongful termination, contractual disputes, and other issues involving the employment relationship.

Sarah has been extremely fortunate to have a large number of civil jury trials in her nearly eleven years of practice.

Sarah is an active member in good standing with the Indiana Bar Association and also holds membership with the Indiana Trial Lawyers Association. As part of her membership with the Indiana Trial Lawyers Association (ITLA) she has had the privilege to speak at seminars hosted by ITLA both on employment matters and issues involving claims for injuries.

Danielle L. Gregory, The Law Office of Danielle Gregory P.C., Indianapolis

Danielle Gregory has a background in accounting and is a registered mediator. She began her practice in 1997 and has helped numerous clients win their legal battles. The Law Office Of Danielle Gregory provides adoptions, divorce, child support, paternity, mediation, guardianship, and free consultations to the Indianapolis, IN area.

Michael B. Langford, The Mediation Group LLC, Indianapolis

Mike Langford litigated high stakes civil lawsuits throughout his 27 year career as a trial lawyer. He regularly tried jury trials nationwide and argued before state and federal appellate courts as well. He has been involved in several appellate cases that decided important issues of first impression. In recognition of his trial skills, Mike has been inducted as a Fellow of the American College of Trial Lawyers, which membership requires the highest standards in several areas including trial advocacy and collegiality and is limited to no more than one percent of the state's total lawyer population.

He also served as Chairman of the American College of Transportation Attorneys, which consists of the 30 most preeminent transportation litigators in the country. Mike routinely represented individuals, family owned companies and Fortune 500 corporations. In that capacity, Mike counseled clients in hundreds of mediations that successfully resolved their disputes.

Mike is registered mediator. He has now refocused his career to serving as a mediator and arbitrator and, with the same tenacity and creativity that he honed as a trial lawyer, Mike helps parties achieve successful resolutions of their cases. He mediates all types of civil disputes including trucking, personal injury and wrongful death, products liability, insurance coverage, bad faith claims, employment law, class actions, real estate issues, and commercial and business disputes.

Mike was raised in New Castle, Indiana. He is an honors graduate of Wabash College and graduated Order of the Barristers from Indiana University School of Law, Bloomington. He has been a prolific speaker at national conferences and has authored dozens of published articles on litigation subjects. He is also a regular legal commentator on national radio shows. When he's not working, Mike enjoys tennis, stand-up comedy (often in the audience but sometimes on the stage), US history trivia, coaching a high school debate team, and spending time with his wife and three children.

Hon. Gary L. Miller, Marion Superior Court, Civil Division 3, Indianapolis

The *Hon. Gary L. Miller* is Judge of Marion County Superior Court, Civil Division #3 in Indianapolis. Previously, he was a Partner with the Indianapolis firm, MillerMeyer LLP. Gary has lived in Indianapolis all of his life. He is a 1974 graduate of North Central High School and a member of its Wall of Fame. He attended Indiana University in Bloomington and graduated in 1977. He is a 1980 graduate of the Indiana University School of Law at Indianapolis. While in law school, he worked as a bailiff in the Municipal and Circuit Courts. He joined the prosecutor's office as in intern and when he graduated law school was immediately offered a job as a Deputy Prosecuting Attorney. His assignments included stints in Juvenile court, the misdemeanor courts and felony division. He tried more than 30 major felony jury trials. Miller left the prosecutors office in 1983 to join the law firm of Hollingsworth & Meek. He worked there until 1986 when the Indiana Supreme Court appointed him as a Judge Pro Tem to serve in the place of a Judge who had become ill. In 1990, Gary ran for and won his first of three terms as Judge of the Marion Superior Court. For ten years Gary presided in Marion Superior Court, Criminal Division 5 where he presided over numerous high profile cases. In January 2001, he transferred to the Civil Division where, over the next 8 years, he presided over civil cases, including family law, contracts, medical malpractice and personal injury. Gary retired from the bench at the end of 2008 to open MillerMeyer LLP concentrating on mediation, civil and criminal litigation and advising attorneys on issues of legal ethics, attorneys' fees, attorney practice and malpractice avoidance. Gary has taught courses in Trial Practice and Professional Responsibility at the IU School of Law in Indianapolis since 1992. He has lectured throughout the United States and in Canada on issues including legal ethics, malpractice and trial tactics. Bar Admissions: State of Indiana, 1980 U.S. District Court Southern District of Indiana, 1980 Education: Indiana University School of Law, Indianapolis, Indiana, 1980 Indiana University, Bloomington, Indiana, 1977 Adjunct Professor of Law: Indiana University School of Law at Indianapolis Professional Responsibility, 1997- present Trial Practice, 1992-2007.

Peter H. Pogue, Schultz & Pogue, LLP, Indianapolis

Peter H. Pogue, a principal in Schultz & Pogue, LLP, graduated from DePauw University in 1983. After spending three years with the Minority Leader of the New York State Assembly, Mr. Pogue received his J.D. from Valparaiso University School of Law in 1989 where he was a member of the Valparaiso University Law Review.

Mr. Pogue is a member of the Defense Research Institute (Medical Liability Section), was the DRI Young Lawyers' Liaison to the Drug and Medical Device Committee Steering Committee in 1995-96, the Defense Trial Counsel of Indiana (Medical Malpractice Section Chair 2001-2002), the Editorial Board for the American Health Information Management Association (1996-2002), and served as National President of the Valparaiso University School of Law Alumni Association (2000-2002). Mr. Pogue also has given numerous seminar presentations including the ICLEF Masters Series in Medical Malpractice, Nursing Home Negligence, Pharmacy Malpractice and risk prevention in medical malpractice and pharmacy malpractice.

Mr. Pogue has extensive medical malpractice jury trial experience, taking numerous medical malpractice cases to verdict to juries and judges. Mr. Pogue practices in the areas of Medical Malpractice, Pharmaceutical Malpractice, Nursing Home Negligence, Legal Malpractice, as well as representing healthcare professionals before various licensing agencies.

Melanie K. Reichert, Broyles Kight & Ricafort, PC, Indianapolis

Melanie K. Reichert joined the Family Law Group at Broyles Kight & Ricafort, P.C. in August 2004. With training in mediation and collaborative law ("no court divorce"), she emphasizes making every effort to resolve family conflict during divorce without costly and devastating litigation. However, she is also an experienced family law litigator who frequently assists clients in hearings addressing complicated custody matters, jurisdictional issues, child and spousal support, allegations of child abuse or neglect, allegations of domestic violence, and property distribution. Melanie helps children find permanency by assisting their foster parents, relatives or step parents in completing adoptions. She also helps individuals attempt to avoid future conflict by drafting premarital agreements, wills, simple trusts and other basic estate documents. Melanie advocates for children as a volunteer Guardian ad Litem and a private Guardian ad Litem.

Prior to joining Broyles Kight & Ricafort, P.C., Melanie was a partner at an Indianapolis law firm and served as a part time judicial officer in Marion County Circuit Court, paternity division. She is married with three children.

Wayne C. Turner, Hoover Hull Turner LLP, Indianapolis

Wayne Turner is a founding partner of Hoover Hull Turner LLP. His practice for more than thirty years has been business litigation in federal and state trial and appellate courts. Wayne's practice includes securities and corporate governance disputes, defending large law firms and accounting firms against professional liability claims, government and regulated utility litigation, class action defense, supply chain matters, and a variety of business tort and contract disputes. Wayne served for several years as the Chair of the Litigation Practice Group of a regional law firm.

Hon. Randy J. Williams, Judge, Tippecanoe County Superior Court 1, Lafayette

The Honorable Randy J. Williams is Judge of Tippecanoe Superior Court 1. Prior to the Bench, Judge Williams was a partner with Ball Eggleston, PC in Lafayette. He received his undergraduate degree from Hamilton College and his J.D. degree from the Albany Law School.

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Section One

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Section One

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Notes

Section Two

Negotiating Catastrophic Cases

Sarah Graziano
Hensley Legal Group, PC
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Section Two

Negotiating Catastrophic Cases…… Sarah Graziano

PowerPoint Presentation

ICLEF

MEDIATION AND NEGOTIATION OF DIFFICULT CASES

Sarah Graziano

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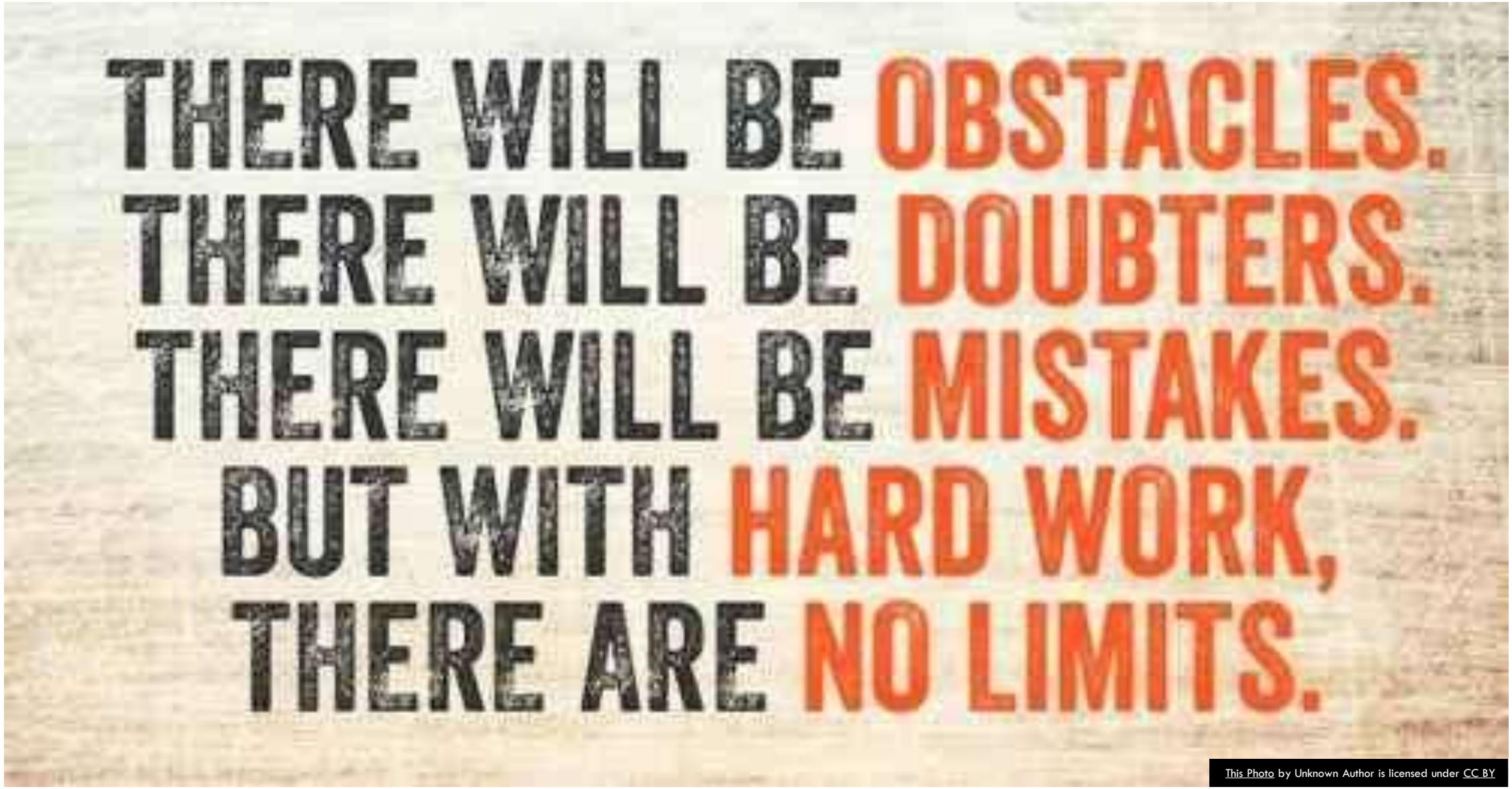
SHOW

LEVERAGE IN SETTLEMENT

- REPUTATION OF THE PLAINTIFF'S FIRM
- THE REPUTATION OF THE SPECIFIC ATTORNEY
- TRIAL EXPERIENCE
- COURT/JUDGE
- CLIENT CONTROL
- PREPARATION
- WORK UP OF CASE
- TIMING OF NEGOTIATIONS

LEVERAGE
HOW DO YOU ACHIEVE IT?



PRESENTATION

ROAD MAP TO SUCCESSFUL NEGOTIATION

Reputation to work hard, work it up and be prepared

If you are not the best presenter, seek guidance, help or co-counsel

If you are trial inexperienced, team up dividends will pay off in the long run

Set expectations:

EARLY

and OFTEN with clients,

Timing has a huge impact, trial dates make the biggest impact;

FOCUS GROUPS

BARRIERS TO SETTLEMENT

- CLIENT CONTROL
- LACK OF PLANNING
- LACK OF PREPARATION
- UNREALISTIC EXPECTATIONS
- COVERAGE ISSUES
- TIMING OF NEGOTIATIONS
- LIABILITY VS. DAMAGES
- RISK
- THE MEDIATOR

FIND YOUR WAY

HAVE A VOICE

Section Two

Negotiation of Catastrophic Cases and Overcoming Overconfidence Bias

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Section Two

Negotiation of Catastrophic Cases and Overcoming Overconfidence Bias…… Michael B. Langford

Negotiation of Catastrophic Cases and Overcoming Overconfidence Bias

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by
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The Titanic. Chernobyl. The subprime mortgage crisis of 2008. Your recent disappointing jury trial result. What do all of these have in common? They all may have occurred, in part, because of something that psychologists call overconfidence bias. The American Psychological Association defines overconfidence bias as an overestimation of one's actual ability to perform a task successfully.

There's no question that trial lawyers must remain confident in building their case and delivering the case themes. Exuding confidence develops trust with clients and can be persuasive with the judge and the jury. That confidence also must ride side-car with you as enter into settlement negotiations. Carrying a settlement position doused in flimsiness is like walking into the O.K. Corral with a water pistol.

So, nothing in this commentary should be construed as an appeal for trial lawyers to shuck their confidence at the mediation or courthouse doors. And yet, the question remains: How does an attorney find that fine line between confidence and overconfidence when counseling

clients on whether to accept the other side's final settlement number or proceed to trial instead? Perhaps that inquiry should begin with an examination of how and where does overconfidence reveal itself for the trial lawyer.

Overconfidence Bias Dissected

Psychologists who have researched overconfidence bias generally group it in three camps. These camps are not always mutually exclusive as sometimes two or all three can be present in single thought bubble. The first area of overconfidence is an overestimation of one's actual performance. In litigation, this can arise when trial lawyers believe and counsel clients that the lawyer has a superlative ability for valuing cases or convincing judges and juries that the lawyer's views are the correct one. Giving great weight to prior victories has a way of increasing the risk of overestimation. Of course, there is a reason why financial advisors governed by the SEC are encouraged to share with their prospective clients, "Past performance is not indicative of future results."

The second camp of overconfidence is an overplacement of one's performance relative to others. Trial lawyers, with their full throttle competitive juices, can be particularly susceptible to this type of overconfidence. "I am a better negotiator than the other side," or "I am better in the courtroom than the other side" are not uncommon self-evaluations. Sometimes this overplacement is referred to as the "Lake Wobegon effect." This is named for the fictional town of Lake Wobegon from the radio series *A Prairie Home Companion*, where, according to Garrison Keillor, "all the children are above average." This better than average concept has reaches beyond Mr. Keillor's quip. Research has borne out that many of us feel the same way about ourselves. From a seminal study on overplacement of one's own performance, it was revealed that 93% of American licensed drivers participating in a scientifically reliable survey

believe they are more skillful drivers than the median driver. *See Svenson*, O. (1981), Are we all less risky and more skillful than our fellow drivers? *Acta Psychologica*, 47, 143-48. Of course, this is a statistical impossibility, but the overconfident brain can play tricks on us! An interesting sidenote is that this overplacement bias might be an especially American trait. In that same study, only 69% of Swedes placed themselves as more skilled than the median driver. One further sidenote is that research also indicates that men are more overconfident than women. *See* Ehrlinger J, Dunning D. How chronic self-views influence (and potentially mislead) estimates of performance. J Pers Soc Psychol. 2003 Jan;84(1):5-17. PMID: 12518967 and Kay and Shipman, The Confidence Gap, *The Atlantic*, May 2014 (referencing several academic studies on the overconfidence of men and the underconfidence of women). So, if you are an American man, you may be especially prone to overplacement.

The third area of overconfidence is an overprecision of expressing the accuracy of one's belief. In my civil mediation practice, this is the type of overconfidence that I witness the most. Gamblers, day stock traders, and trial lawyers can all fall into this trap of overrating their ability to predict a future course of events. Past successes, strong advocacy, general enthusiasm for the goal, and even posturing are ingredients that bake into the overprecision mix. I have observed many attorneys predict, often in front of their clients, near certainty of future rulings by the judge or verdicts that will be delivered by the jury. Usually, the jury verdict prediction is not cast in terms of an exact number, but instead as, "There's no way the verdict will be below [or above] a certain amount." I have also seen quite a few crystal balls shatter when the verdict gets read.

Checking Your [Over]Confidence

To be sure, I get the challenge. In my 27 years as a trial lawyer, I attempted walking that tightrope of being confident, but not overly confident. Sometimes, I lost my footing and fell off that tightrope, landing with a crash. In more recent years, I have served as a full-time mediator and arbitrator, and, in that role, I have gained a new perspective on the tricky balance of confidence. That perspective is aided by no longer being tethered to zealous advocacy for a client. From my new perch, I offer these few ideas and observations about undertaking a self-check on your confidence level.

First, let's say aloud the obvious: "I am a zealous advocate for my client. However, sometimes that zeal can cause me to think mostly about why my clients should win, not why they could lose." Simply recognizing that tendency arising from strong advocacy can serve as the first check on overconfidence.

Next, it is crucial to seek out trusted advisors to test the merits of your confidence. Trial lawyers are notorious for workshopping their cases with other lawyers, those in their offices and perhaps with family and friends as well. But are you sharing those case details almost exclusively inside your own echo chamber, and therefore are you only hearing why you are right about nearly perspective you have on the case? Or are you inviting others to tell you why you are wrong and asking to be challenged on the most troublesome parts to your case and the best parts of the other side's case?

In a similar vein, are you wisely using your focus group and mock juries? In mediations, attorneys often share with me the favorable results they obtained at their focus groups and mock jury trials. As a litigator, I regularly used focus group and mock juries to prepare for trial, test trial themes, learn which types of potential jurors to select or deselect, and consider the possible effect of certain evidence being admitted or not admitted at trial. Admittedly, I was always

interested in the verdicts that were delivered in the mock forum as well. However, I learned that those mock verdicts are better viewed as data points for consideration than as predictors of what will happen at trial. Even so, at mediation I sometimes hear mock outcomes mentioned with an air of confidence that surprises me. It is nearly impossible to accurately duplicate the length, complexities, drama, and human emotions of a jury trial with a day long abbreviated presentation made inside a conference room. So, the mock outcomes – good or bad for your side – seemingly should be tempered by this "not quite like a trial" concession. Also are your ensuring that the other side is being represented in the mock exercise with the same or more experience, conviction and sophisticated presentation that will be advanced at the real trial? Tipping the balance a bit in the favor of the opposing side at a mock trial can serve as healthy check on your own case confidence.

Another factor that can amplify overprecision bias is giving too much weight to aberrational results. It's easy enough to be overly affected by your most recent favorable verdict, recent verdicts that are coming from the venue where your case will be tried, or the superb verdict in someone else's case that seems to favorably match the facts of your present case. Still, every case truly does stand on its own. Future juries rarely if ever consider what any prior jury has done in similar, earlier cases. The randomness of any given jury's composition is undeniable, and that randomness makes the reliability of the next verdict, even with similar underlying facts, wobbly. Attorneys make good and bad strategic decisions in every trial, and that everything went or didn't go an attorney's way in one trial is not necessarily predictive of how the next trial will go for the attorney. Also, I have found it's initially difficult to discern whether that big verdict attorneys are talking about at bar functions is the sign of a trend or a mere aberration? In fact, it often takes many years of verdicts to know whether any one verdict was a deviation or part of a

perceptible trend. So, in short, be careful about allowing possible aberrational verdicts to unduly influence your confidence about future results.

Finally, keep your own scorecard. When you make your prognostications about the future result of a trial, commit your predictions to writing and tuck them away in a file. When the trial is over, go back to that file, and input the actual result. How close were you to predicting the result, and in retrospect, does it now look like you gave your client and yourself sound advice about the other side's last settlement proposal and going to trial instead? You can't win them all, and sometimes this retrospection might fill you up with undeserved regret. It happens. Yet, the real purpose of the maintaining your own scorecard isn't to inflate or deflate your ego but instead to give you an honest check of your ability to predict future outcomes. One or even a few right or wrong predictions does not provide the conclusion about your forecasting accuracy, but a well-kept scorecard over the years can give insight about whether you need to reign in overprecision bias.

Confidence is a vital trait for any trial lawyer. Keep it handy, but watch letting it overshadow your measured decision making and advice giving. I am reasonably confident of all these opinions. But hopefully not overly so.

Negotiating Catastrophic Cases

Michael Langford
The Mediation Group

The Big Three Obstacles to Negotiating a Catastrophic Case

1. Overconfidence Bias
2. Negativity Bias
3. Fear of Concession

Overconfidence Bias

- The Mother of All Cognitive Biases
- According to a well-cited study, 93% of all American licensed drivers claim to be better than average driver – a statistical impossibility!
  - In same study, only 69% of Swedish drivers claimed to be better than average.
- Well-known examples of over-confidence:
  - The Titanic
  - Chernobobyl
  - Challenger and Columbia Space Shuttles
  - Subprime Mortgage Crisis
  - Deepwater Horizon Oil Spill

Overconfidence Comes in Three Ways

1. Overestimation of one's actual performance.
   - "I will convince the Judge and the Jury to find my way."
   - "I have a keen ability for knowing the value of cases."

2. Overplacement of one's performance relative to others.
   - "I am a better negotiator than the other side."
   - "I am the better trial lawyer in the case."

   "Lake Wobegon effect" – "where all children are above average"

3. Overprecision in expressing the accuracy of your belief.
   - "I am a better predicter of the future rulings and verdicts."
   - Gamblers, day stock traders, and trial lawyers can fall victim to this.

Addressing Overconfidence Bias in Case Negotiations

- “Really bad verdicts often have a trail of bad decisions leading up to them. Chief among them are decisions arising from overconfidence, spite, and/or stubbornness.”
- Tips:
  1. Recognize that your advocacy bias can develop into overconfidence bias.
  2. Play the hand fairly at focus groups and mock jury trials.
  3. Constantly test the case with opinions you trust, not just “affirmers.”
  4. Ask your mediator for his or her opinions on valuation.
  5. Fight against the inclination to chase aberrational results.
  6. Keep your statistics – how good are you actually at predicting results?

Negativity Bias

- People pay more attention to negative events than positive ones, even when the events are of equal magnitude.

- Example: when presented with an opportunity to win $150 or lose $100, with equal probability, studies found that most choose not to take the chance because the risk of losing $100 is too great.

- Negative differentiation is a big part of negativity bias.
  - Since negative events are more complicated than their positive counterparts, we use more cognitive resources to minimize the consequences of the negative event, making it a more memorable and intense experience.
    - Negative discovery
    - Negative rulings
    - Negative demands, offers and ancillary conditions

Addressing Negativity Bias

Tips

"It's not a mediation until someone threatens to walk out."

1. Negotiations aren't supposed to be easy. Assume there will be snags and disagreements, and you'll react less intensely when they do.
2. Find the positive in every demand, offer, and accompanying message.
3. Concede that contested issues will remain unresolved in a settlement.
4. Understand the mood of the room, and the attorney may need to recalibrate.
5. Notice the positive that is happening at a mediation, any way:
   - Met a court obligation
   - Met other parties and shared ideas
   - Gave focus to what still needs to be done with case development
   - The progress that was made in the negotiations

Fear of Concession

"The only thing you have to fear in making negotiation concessions is yourself."

Tips

1. Embrace that catastrophic claim negotiations take dozens of concessions.
2. Watch creating artificial obstacles to negotiations – "It's too early," "It's too late," "The other side isn't serious," or "Not everything is done yet."
3. Be careful about boxing yourself in with "bottom line," "you must," or "we will never," or "I don't bid against myself" stated positions.
4. Be creative with concessions. They don't always have to involve dollars.

Section Three

Settlement Conferences in Federal Court

Hon. Mario J. Garcia
United States District Court
Southern District of Indiana
Indianapolis, Indiana

Section Three

Settlement Conferences in Federal Court…….. Hon. Mario J. Garcia

PowerPoint Presentation

Settlement Conferences in Federal Court

THE HON. MARIO GARCIA

UNITED STATES MAGISTRATE JUDGE

SOUTHERN DISTRICT OF INDIANA

Tips and observations

- **Introduction**
  - 21 years of general litigation experience, including civil, criminal and appellate law at Brattain Minnix Garcia.
  - Extensive involvement in District Court programs (Local Rules Committee, Criminal Justice Act panel, Recruited Counsel program).
  - Registered Indiana civil mediator.
  - Since April. 5, 2021: Conducted 170+ settlement conferences.
  - 82% settlement success rate.

Tips and observations

- **When to conduct a conference?**
- Consider timing of conference scheduling, (i.e. ***before*** summary judgment, possibly even before extensive discovery).
- Reach out to opposing counsel to discuss the case and timing.
- Consider disputed and undisputed potential damages.
- Consider informal exchange of information (remember Rule 26 disclosure requirements).
- Make essential witnesses available for informal interviews.

Tips and observations

- 98% of cases will resolve themselves either via MSJ or settlement.
- Understand the summary judgment standard and obligations under S.D. Indiana Local Rules.
  - (He said/she said employment or discrimination cases are not ideal for an MSJ).
- Rarely are Motions to Dismiss granted, and often without prejudice when granted.
- While costs of litigating may not matter to a client, they need to be realistically apprised of what federal litigation may entail.

Before your settlement conference:

- Don't submit a settlement statement on the day of a conference-read the Order on when it is due.
- Think about your case's strengths and weaknesses.
- Control has value, but requires compromise.
- Call the other side ahead of the conference.
- Specify your damages and break them down.
- Be prepared to be creative.
- Don't ignore M.J.'s thoughts or messaging.

Final thoughts…

- **Come visit the District Court.**
  - **Yes, the courthouse is an open, public building.**
  - **Take a tour.**
  - **Attend CLEs and join the historical society.**
  - **Volunteer for a pro bono or recruited counsel case.**
  - **Lots of opportunities to get appointed for only a settlement conference on a recruited counsel case.**

Section Four

Negotiating Medical Malpractice Cases: Two Perspectives – The Who, What, When, Why & How of The Art of Negotiating and Mediating Medical Malpractice Cases

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Section Four

Negotiating Medical Malpractice Cases: Two Perspectives – The Who, What, When, Why & How of The Art of Negotiating and Mediating Medical Malpractice Cases……..Caroline A. Gilchrist
Peter H. Pogue

PowerPoint Presentation

NEGOTIATING MEDICAL MALPRACTICE CASES: TWO PERSPECTIVES

THE WHO, WHAT, WHEN, WHY & HOW OF THE ART OF NEGOTIATING AND MEDIATING MEDICAL MALPRACTICE CASES

SPECIAL CONCERNS IN NEGOTIATING AND MEDIATING MEDICAL MALPRACTICE CASES

- Mediating cases with the healthcare provider(s).
- Mediating cases with the Patient Compensation Fund (PCF).
- Mediating cases before a Proposed Complaint is filed.
- Choosing the right mediator.

❖ Negotiating and Mediating cases with the qualified HCP

- Be aware of what recovery limitations apply pursuant to IC 34-18-14-3.

  Before January 1, 1990 – $75,001/$100,000/$500,000

  After December 31, 1989 and before July 1, 1999 –$187,001/$250,000/ $1,250,000

  After June 30, 1999 and before July 1, 2019 – $300,001/$400,000/$1,650,000

  After June 30, 2019 – $375,001/$500,000/$1,850,000

- Understand annuity options: age, dependents, and other considerations
- Attorney fees (IC34-18-18-1): Before July 1, 2017, 15% from PCF; After June 30, 2017, 32% of any recovery.
- Be aware of medical bills, lost wages, liens (CMS, Medicaid, etc.), expenses

Negotiating and mediating cases with the HCP: additional considerations

- Is consent needed?
- Are there multiple defendants?
- Is a defendant an employee of a hospitals or group?
- Is the value less than what is needed to get to the PCF?
- Any potential for lien reduction?
- Conditional settlement with one defendant?
- Defendant only mediation?
- Qualified and non-qualified HCP's.

Negotiating and mediating with the PCF

- Only issue is damages (breach and causation "admitted"*).
- Past settlements with the PCF in similar cases.
- Understand all elements of damages. Provide detailed information to support those damages to the PCF.
- Creative ways to identify and value those damages?
- Understand medical bills, economic loss, paid and outstanding liens, and be prepared to know if there is the potential to reduce any liens.

*This does not mean there are not issues raised relating to life expectancy, etc.

Robertson v. B.O., 977 N.E.2d 341 (Ind. 2012); Green v. Robertson, 56 N.E.3d 682 (Ind. App. 2016)

Negotiating and mediating cases before the filing of a proposed complaint

- Understand what considerations might come into play:
  - Confidentiality
  - No structure (case worth less than Fund or Fund case)
  - More cash/less annuity
  - Payment over and above what is required to get to the PCF
  - Cooperation from treating physicians, cooperation from counsel relating to elements of PCF case, etc.
  - Expenses
  - Human element: apology, need to know what happened, etc.

Rethinking Joint Sessions and Opening Statements: Things to Consider

- From Mediator's perspective: Ask if a joint session and opening statement will move a case in the right direction? Are there good reasons not to have opening statements and a joint session that you have been advised about in advance of the mediation?

- From the perspective of the respective parties:
  - Have there been depositions? Will a party make a good appearance/witness? Will it help to see the injury?
  - Consider whether the decision-maker is fully apprised of the facts.
  - Does one of the parties need to hear some tough facts.
  - Are there considerations that co-defendants need to hear?
  - Is this the first time a party will see the whole picture?

- Be well-prepared. A well-done opening can be effective.

Section Five

Judicial Panel on Negotiations

Hon. Gary L. Miller
Marion Superior Court, Civil Division 3
Indianapolis, Indiana

Hon. Randy J. Williams
Tippecanoe County Superior Court 1
Lafayette, Indiana

Section Five

Notes

Notes

Section Six

Negotiating & Mediating Commercial Cases

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Section Six

Section Seven

Negotiating and Mediating Commercial Cases

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Section Seven

Negotiating and Mediating Commercial Cases……..… Wayne C. Turner
A. Richard M. Blaiklock

PowerPoint Presentation

Negotiating and Mediating Commercial Cases

WAYNE TURNER, HOOVER HULL TURNER, LLP

RICH BLAIKLOCK, LEWIS WAGNER, LLP

Enlist the opponent

- Diplomacy is often underrated
- 98% of cases settle – at some point you'll need to make a deal
  - Helpful to be respected, not hated
  - And to have credibility with your opponents
- The objective is not to make your opponent miserable – it is to resolve disputes, as much as possible in your client's favor
- That means the primary goal is often not to "win" the case

Enlist the opponent

- Be sensible, early
- Reach out early to establish rapport
  - Talk
- Get coffee or lunch – sit down and discuss the case (imagine that)
- Explore whether early settlement makes sense, is at all possible

Don’t be just a hammer

- When you’re hammer, every problem looks like a nail
- Surgeons – cut out the offending part
- Are there alternatives to resolving a case other than to just “pay” or “receive” money?

Is there another way?

- Could a business deal/transaction/other produce a better and more efficient result
  - Deadlock
  - Avoiding litigation that consumes the business assets
  - Avoiding a fight that breaks apart a family
  - Avoiding publicity
  - Achieving a win-win

Timing

- Pre-suit
- Early in litigation
- After significant ruling, or pending the significant ruling
- Will discovery help?
- Considerations:
  - Cost / time / business interruption
  - Ongoing business relationship
  - Public relations issues
  - Supply chain issues

Business-to-business meeting

- Get decision makers together
  - With or without lawyers?
- Set ground rules
  - Confidential / IRE 408 / other
- Document key terms: make sure they put pen to paper before they separate

Bring others into the fold?

- Use good mediators – but also consider other options, especially when the battle is personality driven:
  - The mutually trusted elder / advisor / even pastor
  - The meeting of uninvolved business representatives
  - The independent accountant or professional

Mediation

- Who to bring?
  - Client (but who?)
  - In-house counsel.
  - Other? Will they *help* solve the problem?
    - Transactional lawyer
    - Valuation expert
    - Trusted advisor of client
- Preparation:
  - Narrow down damage calculation disputes
  - Narrow down other disputed areas
  - Agree on what you disagree about
  - Prepare your client for creative alternatives

Mediation

- Share mediation statements with the other side?
- Opening statements, yes or no?
  - Will it be productive or confrontational?
    - Inquire of mediator
  - Will a vent session help?
  - Talk with client ahead of opening statement session

Enlist help to develop creative alternatives.

- The transactional lawyer – different perspective / different objective
  - Looking for a business solution
  - Can lead to calm discussions, de-escalation
  - Explore options not yet considered
    - Sell the business
    - Find common ground on valuation
    - Find an investor
    - Structure a buy-out in a feasible way
    - Ongoing relationship with different terms
  - Can we give value to the other side in a way that doesn't require us to write a check?

Creative alternatives to settlement roadblocks

- Parse out and think about alternatives to difficult/roadblock issues:
  - Expedited arbitration.
  - High/low on contested issue.
  - Agree in advance to methodology to resolve potential future disputes.
  - Agree on a third-party/lawyer to handle a piece of the settlement.
  - Bake in settlement value through ongoing relationship (create an ongoing relationship, or adjust an existing one).
  - Payments over time.
  - Will tax treatment impact what is "acceptable" for settlement?

Examples

- Some recent examples
  - Executives at odds – but who needed one another
  - Deadlocked shareholders
  - The dysfunctional family – with a shifting majority
  - The Rube Goldberg corporate structure
  - Winding down supply relationship
  - Competitors
    - [but don't forget antitrust issues]

Special Masters – Commercial Court

- Interim Rule 5. Commercial Court Masters
  - Commercial Court Judge may appoint a Commercial Court Master
  - Compensation to be paid by the parties.
  - A Master may include "an attorney, a senior judge, or a non-attorney . . . Who has special skills or training appropriate to undertake to perform the tasks that may be required."

Special Masters – Commercial Court

- Powers of a Master – Interim Rule 5(B)
  - The "order of reference" "shall specify the Commercial Court Master's powers"
  - The Master may "report on particular issues"; "do or perform particular acts"; "receive and report evidence"
  - The Master "may require the production of evidence"
  - The Master "may rule upon the admissibility of evidence . . . and has the authority to put witnesses under oath . . . and may call the parties to the action and examine them under oath."

Special Masters – Commercial Court

- Theme – creativity and flexibility will benefit your clients and help them resolve their disputes
  - Remember what we said about having a working relationship with opposing counsel
- So – when do we want a Master appointed
- Considerations
  - Efficiency
  - Certainty
  - Confidentiality

Special Masters – Commercial Court

- Discovery
  - Substantial ediscovery processes
  - Resolving protective order terms
  - Resolving discovery disputes
- Discrete legal issues
  - Is it a trade secret
  - Valuation – use one expert for an independent determination
  - Even – what is the meaning of a key contract term
  - Was the contract breached
  - Remember the standard for summary judgment

Section Eight

Ethical Considerations

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Section Eight

Section Nine

Mediation and Settlement of Worker's Compensation Claims

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Section Nine

Mediation and Settlement of Worker's Compensation Claims……...…Robert J. Doyle

I. INTRODUCTION

From the first moment a worker's compensation file comes into your office, consideration will be given with respect to the resolution of the claim. The vast majority of claims that are filed in front of the Workers' Compensation Board of Indiana are disposed of prior to the formal hearing process in front of a Single Hearing Member of the Worker's Compensation Board. Most cases that are filed in front of the Workers' Compensation Board will be resolved pursuant to I.C. 22-3-2-15 and these settlement agreements are commonly referred to as Section 15 agreements. The following section will address some practical issues with respect to the resolution of your worker's compensation claims including the mediation process, which has now become a widely used tool to resolve disputes in front of the Workers' Compensation Board of Indiana.

II. AGREEMENT TO COMPENSATION of EMPLOYEE and EMPLOYER

The Agreement to Compensation of Employee and Employer is a form that was designed by the Workers' Compensation Board of Indiana pursuant to I.C. 22-3-4-4. The statute requires that employers and injured workers who have reached an agreement with respect to compensation to file a form with the Workers' Compensation Board and obtain approval. An approved Agreement to Compensation constitutes a binding admission of liability on the part of the Defendant. *R.L. Jeffries Trucking Co., Inc. v. Cain* 545 NE 2d 582 (Ind. App. 1989). In addition, an approved Agreement to Compensation may also bind the parties to the Board's jurisdiction over the claim. *Indiana University Hospitals v. Carter*, 456 NE 2d 1051 (Ind. App. 1983). In the IU Hospital decision, the Court determined that despite Ms. Carter's claim that her accident did not occur in the course of her employment, the Court found that she had made a binding election of remedies precluding her from pursuing another separate remedy once the Agreement to Compensation was signed and approved by the Board. *Id.* The agreement further functions as a means to note the proper temporary total disability rate to be paid.

III. PERMANENT PARTIAL IMPAIRMENT

Once an injured worker reaches the point of maximum medical improvement, an Agreement to Compensation form may also be used to

settle a disputed or undisputed claim for permanent partial impairment. Most non-litigated claims are resolved on the basis of the impairment and can be settled and approved without any further difficulty. In order to obtain approval from the Board, a filed Agreement to Compensation must include a completed signed Employee Waiver of Exam by a personal physician form (see Appendix) and a medical report establishing the PPI rating. Once the Board receives these documents, the Board will review the medical report and the PPI calculations. If the Agreement to Compensation is calculated correctly, the compensation due to the injured worker, based upon the rating, shall be approved. It is important to include the three (3) copies for the Board and self-addressed, stamped envelopes for the return of the approved settlement documents. The final approval of the agreement to the PPI compensation will result in a closure of a disputed claim. However, the approval of an Agreement to Compensation will not result in a full and final release of claims by the parties and any language contained therein will not be approved by the Board. Parties wishing to secure full and final settlements must submit stipulated agreements under I.C. 22-3-2-15, which are discussed below.

IV. SETTLEMENT AGREEMENTS UNDER I.C. 22-3-2-15

The statutory authority for compromised settlement agreements under Indiana's Workers' Compensation Act is found at I.C. 22-3-2-15. This section provides:

> (a). . .Nothing in I.C. 22-3-2 through I.C. 22-3-6 shall be construed as preventing the parties to claims under I.C. 22-3-2 through I.C. 22-3-6 from entering into voluntary agreements in settlement thereof, but no agreement by an employee or his dependents to waive his rights under I.C. 22-3-2 through I.C. 22-3-6 shall be valid nor shall any agreement of settlement or compromise of any dispute or claim for compensation under I.C. 22-3-2 through I.C. 22-3-6 be valid until approved by a member of the Board, nor shall a member of the Worker's Compensation Board approve any settlement which is not in accordance with the rights of the parties as given in I.C. 22-3-2 through I.C. 22-3-6.

A compromise settlement agreement pursuant to this section results in a waiver of right under the Worker's Compensation Act. *Goff v. Wal-Mart Stores, Inc.*, 719 NE 2d 1260 (Ind. Ct. App. 2000). For the employee, the right to a modification of the award, as well as the rights to the Second Injury Fund are waived by entering into a compromise settlement agreement under I.C. 22-3-2-15. For employers, subrogation and lien rights under I.C. 22-3-2-13 may be waived, unless a provision in the settlement agreement specifically states otherwise. The Act requires that all settlement agreements be approved by the Board in accordance with the rights of the parties under the Act. The Board is not bound to approve all Section 15 settlement agreements submitted, and the Board has the sole jurisdiction to determine whether a Section 15 settlement agreement is in proper form and applicable to a case. There are a number of reasons why parties would want to submit a claim for a compromised settlement under Section 15. Disputed issues of impairment, past and future medical expenses, past and future disability, dependency, and permanent disability are a few of the most common issues compromised under Section 15.

It is important to remember that once the employer accepts compensability of a claim, a liability dispute must be alleged in order to fully compromise a claim under I.C. 22-3-2-15. The most common circumstance in which this occurs is on the issue of future medical expenses. Many claims may be determined to be compensable and the issue as to what, if any, future medical expenses are due, arises in many cases. The parties are free to execute a settlement agreement under I.C. 22-3-2-15 to fully and finally compromise the claim because of the disputed future medical claim.

a. **WAIVER OF SECOND INJURY FUND BENEFITS**

I.C. 22-3-3-13 provides for the application of benefits under Indiana's Second Injury Fund. Although the complete provisions of the Second Injury Fund are beyond the scope of this article, it most commonly provides benefits for those workers who have exhausted 500 weeks of benefits under Indiana's Workers' Compensation Act or for prosthetics in the case of an amputation. In executing the settlement agreement under I.C. 22-3-2-15, the Plaintiff must recognize that he will waive ALL rights under Indiana's Workers' Compensation Act including the right to petition for benefits under Indiana's Second Injury Fund. Therefore, if a settlement involved the need for a future prosthesis, the parties would need to be careful not to do a Section 15 settlement otherwise a Plaintiff will be disqualified from

applying for future prosthetic benefits. The parties should also avoid a Section 15 if it is imperative that as part of a resolution of the case the Plaintiff accesses Second Injury Fund benefits for disability beyond 500 weeks. The settlement of a worker's compensation claim prohibits receipt of Second Injury Fund benefits and the exhaustion of benefits requirement cannot be met by combining worker's compensation with Social Security Disability. *Kohlmeyer v. Second Injury Fund*, 888 NE 2d 281 (Ind. App. 2008). It should also be remembered that settlement of a third party case also will prohibit assess to the Second Injury Fund. *Mays v. Second Injury Fund*, 888 NE 2d 733 (Ind. App. 2008).

b. **I.C. 22-3-2-13**

Employers must also be cognizant of rights it may be waiving when entering into a full and final release under I.C. 22-3-2-15. I.C. 22-3-2-13 provides employers with subrogation or lien rights on all third party claims. This situation can easily be remedied by including a provision that the employee, in exchange for payment of the disputed worker's compensation claim, shall preserve and retain the Defendant's worker's compensation lien.

c. **PROVIDER FEE CLAIMS**

Another issue that must be considered when entering into a Section 15 settlement agreement is the issue of outstanding medical bills and provider claims. Under I.C. 22-3-3-5.1 a medical service provider may not collect or attempt to collect payment of charges from an employee involved in a worker's compensation claim. The Board now requires that parties review whether or not any provider fee claims have been filed and Section 15 settlement agreements will not be approved by the Workers' Compensation Board of Indiana unless provider fee claims have been resolved as well.

V. MEDIATION

The Indiana Workers' Compensation Board has adopted the discovery trial rules in Indiana but has not officially adopted Indiana's rules for alterative dispute resolution. Nonetheless, the Board has maintained an active role in the mediation process. The Board has provided training for the Ombudsman division to conduct mediations in worker's compensation claims. The parties to a worker's compensation claim may contact the Board at any time and request that the Ombudsman office mediate a

particular claim. The Board's mediation services are free of charge and are a good way of resolving disputes without subjecting your client to the risk of a hearing. For those cases in which there are multiple and complicated settlement issues, the Board may appoint, or the parties are free to appoint, a private mediator in the State of Indiana. Worker's compensation mediations have become quite common in Indiana and certain types of cases are much more conducive to a proper resolution in a mediation rather than a hearing.

The following types of cases are ideal for mediation:

1. PERMANENT AND TOTAL DISABILITY CLAIMS

The current maximum rate for the payment of permanent and total disability for claims after July 1, 2008 is Three Hundred Eighteen Thousand Dollars ($318,000.00). A 10% impairment rating for the same period of time is worth only Thirteen Thousand Six Hundred Fifty Dollars ($13,650.00). We frequently see cases in which a modest impairment is provided by the treating physician, but nonetheless the employee may not be able to return to his old job. Indiana's Workers' Compensation Act does not provide a wage replacement provision. Therefore, if an employee is released to any work, but not his previous employment, the employer's obligation to that employee ends under Indiana's Workers' Compensation Act after the payment of the impairment award. There is an old saying that water seeks its own level. This gap in Indiana worker's compensation law has resulted in a large number of disputed permanent and total disability claims in which injured workers may have no choice but to pursue permanent and total disability benefits given the loss of a high paying job. That gap or level can frequently be better filled in the context of a mediation rather than a hearing. At hearing both sides will be subject to the huge difference in values noted above. A Defendant may well wish to avoid the risk of a Three Hundred Eighteen Thousand Dollar ($318,000.00) judgment and an injured employee may well wish to avoid the risk of receiving an impairment rating only in a case in which he or she cannot return to their previous employment.

2. FUTURE MEDICAL DISPUTES

In many workers' compensation claims, the issue of future medical care is a large issue. *Grand Lodge Free & Accepted Masons v. Jones*, 590 NE 2d 653 (Ind. App. 1992), *Talas v. Correct Piping*, 435 NE 2d 22 (Ind. 1992), *Bloomington Hospital v. Stofko*, 705 NE 2d 515 (Ind. App. 1999).

The Board has jurisdiction over continuing medical disputes and the parties may wish to avoid the risks of proceeding to hearing on the issue of future medical care. The Board can only award medical care as it becomes due, and the Board can determine that additional medical care would not be necessary to limit or reduce impairment and therefore deny that care. A mediation allows the parties to find a middle ground upon which to resolve a future medical dispute.

3. SOCIAL SECURITY DISABILITY PROBLEMS

In many of the permanent and total disability and future medical issues noted above, the issue of Social Security Disability offsets comes into play. Once the Board issues a full award for permanent and total disability or impairment, those payments may be made in a lump sum which may affect an employee's Social Security Disability benefits. Submitting a case to mediation or settlement via Section 15 allows the parties to spread the value of the payments over the life of the claimant in order to avoid Social Security offsets.

4. MEDICARE SET-ASIDES

In many cases as noted above, the claimants are Social Security recipients and/or will be Medicare recipients. At trial, the Board will be limited to awarding or denying future medical benefits. In a mediation the parties can craft a settlement which would allow them to provide for Medicare's interest in the form of a Medicare Set-Aside account or other settlement resolution that covers the contingency or problem of Medicare Set-Asides. Medicare Set-Asides constitute a complicated problem in resolving many workers' compensation claims and mediation provides a forum upon which to resolve those complicated issues.

5. DISPUTED LIABILITY CLAIMS

On occasion, the parties will be in dispute as to the compensability of a claim. Frequently we see death cases or permanent and total disability claims in which liability has not been accepted. Once again, the parties are faced with the risk of an all of nothing verdict. Mediation allows the parties to resolve these large disputes in a proper manner.

6. THE PLAINTIFF'S DAY IN COURT

Frequently employees feel as if they have been wronged or treated unfairly in the context of a worker's compensation claim. Many of these injured workers want and may deserve their day in court. A mediation is a formal enough process in front of a private mediator or a formal enough process in front of the Board Ombudsman to allow an injured worker to feel as if they have had an opportunity to tell their story and in a sense, "have their day in court".

7. EDUCATION OF CLIENTS

Parties will frequently submit cases to mediation as a means to educate clients. Either Plaintiff's counsel or defense counsel may be having difficulty with a client in terms of understanding the true issues in the case or the relative value of the case. Mediation provides a good opportunity to educate parties and allow them to become more comfortable with the realties of the value and problems in the case.