SETTLEMENT/MEDIATION CONSIDERATIONS & STRATEGIES IN TRUCKING OR AUTO ACCIDENT CASES

Presented & Written By:
FRANK E. (DIRK) MURCHISON III
Frank E. Murchison P.C.
Lubbock, TX Office:
P.O. Drawer 98600
Lubbock TX 79499
806.792.4870
806.792.4970 Fax

Taos, NM Office:
P.O. Drawer 700
Taos NM 87571
575.751.3156
575.751.3157 Fax

femurch@aol.com

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EDUCATIONAL BACKGROUND:

BBA: (Finance) Texas Tech University 1971
J.D.: Texas Tech University School of Law 1974

LICENSURE:

Texas: 1974; New Mexico: 2012

BOARD CERTIFICATIONS:

Board Certified – Civil Trial Law & Personal Injury Trial Law
Texas Board of Legal Specialization

PROFESSIONAL MEMBERSHIPS & HONORS:

- Fellow --- American College of Trial Lawyers

- *Best Lawyers in America* --- *Arbitration & Mediation*
  2012 *Texas Lawyer of the Year* --- 1 of 4 Selected

- Diplomate --- American Board of Trial Advocates

- *Texas Super Lawyer* --- Alternate Dispute Resolution

- Member --- Civil Trial Advisory Commission
  Texas Board of Specialization 1987-1992

PROFESSIONAL PRACTICE & EXPERIENCE:

- 1974-2001: Approximately 100 cases tried to jury verdict as lead counsel

- 2001-Present: Practice limited to arbitration & mediation of catastrophic personal injury and complex commercial, estate, trust, employment and sexual abuse cases

  Mediator in *Mike Leach V. Texas Tech University*;

  Over 850 cases arbitrated or mediated, including approximately 40 clergy sexual abuse cases successfully mediated.

femurch@aol.com
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SETTLEMENT CONFERENCE / MEDIATION
CONSIDERATIONS & STRATEGIES IN
TRUCKING OR AUTO ACCIDENT CASES

I. INTRODUCTION
My current practice is exclusively in the area of arbitration and mediation --- heavily weighted toward mediation. In turn, a large portion of my mediation practice is in trucking and automobile accident litigation often involving catastrophic injuries and multiple fatalities. From that vantage point I observe many settlement strategies that work, as well as many ill-advised or ineffective settlement strategies.

The purpose of this paper and my presentation is not to set forth a substantive law analysis of issues; but rather, to look at and consider issues that have to be confronted in the settlement process as well as strategies that work or do not work.

Most state and federal courts in Texas require mediation as a prerequisite to the trial of a case. Accordingly, many of the comments and observations in this paper and in my presentation emanate from the mediation perspective, all of which I have actually experienced over the last 11 years of mediation practice.

II. PLAINTIFF APPROACHES TO DEFENDANTS & THEIR INSURERS
A. Correct Liability & Damage Information
This may sound too basic, but one of the biggest mistakes plaintiffs make in the settlement process is not timely providing the right liability and/or damage information to the people who are going to be paying the settlement money. Liability insurance carriers and corporation defendants simply will not pay adequate settlement values without written or otherwise tangible proof of liability and damage risk.

In preparing and submitting this type of settlement information, plaintiff's counsel is well advised to be in the mind set of "what would I want to see as a claims professional or member of a claims committee in order to justify the settlement demand being made?" Don't make lazy assumptions that liability facts or damage facts are so clear that providing documentation and other information is not necessary.

Do not assume that just because certain settlement documentation and information has been provided to defense counsel that it has also been provided to the appropriate claims representatives. If certain liability or damage information is particularly important to your settlement demand, specifically request defense counsel to provide the information to claims representatives and follow up to get confirmation that the information has been provided to the appropriate claims representatives. If claims representatives see and hear this information for the first time at a settlement conference or mediation, experience tells us they are normally unwilling or unable to respond in the desired monetary manner.

B. Provide Settlement Information Timely
Many corporate and insurance company claims departments have very structured and sometimes layered claims analysis procedures which become increasingly structured and layered as the monetary severity of the claim increases. Obviously, the higher the settlement demand and the higher the severity of the monetary risk, the more the claim and settlement demand is scrutinized. Depending on the circumstances and the claims department procedure involved, claims analysis can be quite time consuming. Therefore, in anticipation of a settlement conference or a mediation it is imperative that the liability and damage information, which plaintiff's counsel wants the claims or corporate representative to see and understand, be submitted well enough in advance in order for the claims process to be completed prior to the settlement conference or mediation.

C. Make It Easy & Don't Wait
Consider not waiting for defense counsel and/or claims representatives to request certain types of settlement information from you --- you should already know what you want them to see for settlement purposes and get it to them voluntarily. Waiting is time lost and lengthens the time period before which settlement can be accomplished.

Since, as plaintiff's counsel, you know the information you want defense counsel and the claims representatives to be evaluating, make it easy for the pertinent information to be accessed and digested. Important liability and damage information buried in voluminous records or spread over multiple sources increases the chance that defense counsel and/or claims or corporate representatives will not see or fully appreciate the relevance or significance of information you want them to understand. Requiring busy defense counsel or busy claims representatives to go to multiple sources to obtain the information plaintiff's counsel wants them to see is not an optimum situation. Just because this information is contained in voluminous discovery responses, document production or deposition testimony, it should not be assumed by plaintiff's counsel that someone on the other side is going to properly identify, extract, organize and present it to the ultimate monetary decision maker.

Therefore, having this information in a concise, well organized settlement brochure or video presentation, that you prepare, is much more calculated to result in the desired settlement result ---- make it easy for them to see/hear what you want them to see/hear about your case.
D. Examples

The following techniques and examples may seem a bit fundamental; however, experiences tells us that they work:

Example 1: Your truck wreck victim is severely and permanently injured and will undoubtedly require significant future medical treatment. There is no clear documentation of what type and extent of future medical procedures will be required or what the cost of that treatment will be. However, formal discovery through expert witness reports and oral depositions is often not required to get this information before defense counsel and claims or corporate representatives. For example, if your injured truck accident victim is going to need a future cervical and/or rotator cuff intervention, consider simply getting letters from the two surgeons, who will be performing these procedures, attesting to the truck accident necessitating the surgeries, a description of the extent of the surgeries, and a statement of expected cost of the surgeries and required hospitalization. Even though such letters in and of themselves probably would not be independently admissible at trial, they may be adequate to support your settlement demands and supply defense counsel and claims or corporate representatives justification for doing what you want them to do ---- place monetary value on future medical.

Example 2: Your automobile vehicle accident case involves severe burns to your plaintiff, who is being treated at a regional burn center. Compelling evidence on the pain and suffering and mental anguish issue can relatively easily and inexpensively, yet effectively, be demonstrated by your own videos of the debridement/dressing change process that your plaintiff endures everyday. These type of videos make it very easy, almost inescapable, for defense counsel and claims or corporate representatives to hear and see the ongoing pain, suffering and mental anguish experienced by your client on a daily basis.

Example 3: Your truck accident victim is severely and permanently injured. The treating physician makes a particularly good witness and is a strong advocate for the permanent nature and effects of your client's injuries. An early settlement conference or mediation is desired. In this event consider doing an ex parte video interview with the treating physician, showing his or her credentials, appearance and substantiating visually and audibly the causation and permanent nature of your client's injuries.

Example 4: The plaintiff group in your multiple fatality motor vehicle accident consists of surviving parents, surviving spouses, and/or surviving children from multiple families. In your settlement brochure, settlement conference and/or mediation, accentuate the family unit concept as an enhancement to damages. Bring the entire family to the settlement conference or mediation to demonstrate, particularly to the claims representatives, that the jury in this multiple fatality motor vehicle accident case will be looking at fractured families.

Example 5: In anticipation of a settlement conference or mediation, you have submitted to defense counsel and claims representatives a concise but thorough brochure with accompanying videos. Well in advance of the mediation or settlement conference specifically ask defense counsel, in writing, if there is additional required information or questions that need to be answered in order for the defense to evaluate your claim and your demand.

Example 6: Your severely injured plaintiff is a highly paid oilfield worker who has a significant past lost earnings, future lost earnings and earning capacity claim. Personal income tax returns and complete W-2s are not readily available. For an early settlement conference or mediation it may be easier to get written wage statements from the current and past employers than it to officially request and receive a tax return and W-2 records from the IRS. These employer wage statements may be sufficient for settlement purposes for claims representatives to make foundational lost earnings conclusions.

III. DEFENSE APPROACHES TO PLAINTIFFS

A. Empathetic Settlement

In a case in which liability is clear and probability of an award of significant damages is also clear, thought might be given by defense counsel and insurers to some degree of empathetic settlement approach. Fundamentally, empathetic settlement involves advancement of funds by defendants or its insurers to plaintiff in a controlled environment --- without any admission of fault and with the right of offset against any monetary judgment ultimately rendered.

This approach can have two benefits. First, where you have an injured plaintiff who has a specific medical or monetary need which cannot otherwise be fulfilled prejudgment, claims personnel may have an opportunity to reach out to provide some of the needed monetary assistance and create a positive relationship with the injured plaintiff and his or her attorney, which can certainly have a benefit in future conclusive settlement efforts.

Secondly, in the case of needed but unaffordable medical or rehabilitative interventions, by providing the needed healthcare, defendant may well be
mitigating the severity of the injury and resulting damage claim.

Empathetic settlement procedures require close cooperation between plaintiff’s counsel, defense counsel, claims or corporate representatives and the injured plaintiff along with his or her family. An atmosphere must be created at the outset such that both sides believe they are dealing with one another in good faith for the ultimate benefit of the injured plaintiff and defendant and not for either side to gain tactical advantage.

B. Early Settlement

Often circumstances are presented which dictate that defendant should initiate and try to complete settlement negotiations early in the process. Typical of these circumstances are the following:

1. As defense counsel, you have a truck accident case and you know from early investigation, based on the facts and witnesses involved, that the case will only get worse as capable plaintiff’s counsel develops evidence. Assembling enough initial investigation to justify early settlement can result in substantial settlement cost savings vis-à-vis the settlement or jury trial result of a fully developed case.

2. Assessment of the financial ability and wherewithal of opposing plaintiff’s counsel is another significant factor in early case resolution. If opposing counsel obviously does not have financial resources to fully develop a complicated multi-party truck or automobile case with serious injuries, then there can be a real opportunity for a beneficial early settlement for the defendant. Often plaintiff’s counsel, who find themselves in this situation, may want to attempt early settlement before either borrowing operating capital or referring the matter to more well financed plaintiff’s counsel.

3. Defense counsel and the trucking company defendant know that the full development of the case, along with anticipated document production from the defendant trucking company, runs the risk of placing in the public forum operational or safety information which has the potential of having a detrimental impact on current related litigation or future litigation. This type of case may well require consideration of early settlement negotiations.

IV. INSURANCE COVERAGE ISSUES

In most, trucking and automobile accident cases, the only realistic source of collection for plaintiff is from one or more liability insurance policies. Therefore, in all cases, a fundamental understanding of how personal, commercial and trucking company liability policies work is essential and in many cases detailed and specific information about the insurance policy or policies is required. The following are some of the most significant insurance coverage issues:

A. Discovery of Potentially Applicable Insurance, Indemnity Agreements, Denial of Coverage and Reservation of Rights

1. Discovering the level of potentially applicable liability insurance is obviously of paramount importance, particularly in developing early strategies for plaintiff’s counsel as to which defendant or defendants to target. Tex. R. Civ. Proc 192.3(f) makes it clear that plaintiff is entitled to discover all potentially applicable policies of insurance and indemnity agreements. Despite this very clear expression of discovery entitlement, I have conducted many mediations in which potentially applicable liability insurance policies either have not been disclosed, have not been adequately disclosed or are disclosed for the first time at mediation.

Particularly for plaintiff’s counsel, the absence or uncertainty of liability insurance information makes it virtually impossible to accurately assess and evaluate serious trucking and automobile accident cases.

Therefore, discovery requests have to be adequately articulated to embrace all potentially applicable policies of liability insurance and/or indemnity agreements which may apply to the accident in question. The traditional way of discovering this information is through the written discovery process; however, if the information is not readily forthcoming, is incomplete or vague in the written discovery process, counsel is well advised to also seek this information by alternative means:

   a. Is the defendant trucking company required to make liability insurance disclosures to local, state or federal regulatory agencies, and if so, can this documentation be obtained?

   b. In the notice of oral deposition of trucking company executives (particularly risk managers), include a request for production at the deposition of potentially applicable policies of liability insurance and/or indemnity agreements.

   c. Look for indicia of liability insurance in other documentation produced in the discovery process;

   d. In the oral deposition of trucking company executives (particularly risk managers), orally inquire of the witness’s knowledge regarding levels and specifics of liability insurance coverage or indemnity agreements.
2. Reservations of rights and denials of coverage present a different set of insurance related problems. Just because a specific set of liability policy or policies have been disclosed and/or produced does not necessarily mean that that policy or policies will be available to satisfy any ultimate judgment. Specifically, the liability insurance carrier or carriers may have reserved their right to deny coverage on specific grounds and/or may have actually denied coverage on specific grounds, and if plaintiff's counsel is not aware of that, then a false reliance on the existence and collectability of liability insurance is in the making. Although discoverability of reservations of rights and denials of coverage and other coverage related issues is not at all certain or clear, nonetheless plaintiff's counsel must make every effort to obtain this information.

Many times the insurance carrier or carriers in question are willing to volunteer this information in order to place the uncertainty of insurance coverage into question for purposes of attempting to deflate the value of a claim. In other instances, the presence of a coverage dispute may be easily identifiable in that liability insurance carrier(s) may have, prior to the initiation of an underlying lawsuit or during the underlying lawsuit, filed a declaratory judgment action seeking resolution of the coverage dispute. Of course, in this instance the identification and ability to know coverage issues will be a matter of public record available to plaintiff's counsel.

In serious automobile and trucking accident cases with high damage potential, the retention of specialized coverage counsel by plaintiff can be very beneficial in at least two respects:

a. Getting expert advice on the validity or not of the claimed coverage defense.

b. Directing discovery in the underlying case so as to avoid the applicability of insurance coverage defense or defenses. For instance, if a trucking company liability insurance carrier has denied coverage to the trucking company or to its defendant driver on the basis on lack of course and scope of employment, and knowing that either or both the trucking company and/or its driver has a natural interest in seeing that he or she has insurance coverage, then plaintiff's counsel can and should develop strategies (many times in cooperation with private counsel for the trucking company and/or driver) designed to develop discovery information and evidence supporting course and scope of employment.

B. Who Is An "Insured"?

Another very important part of the insurance coverage analysis is identifying in the defendant group who is an "insured" under what liability policy or policies. Accurate and successful analyses and strategies require an understanding of this issue.

1. The most common circumstance where this issue becomes important is a situation where the driver of a truck or automobile is an employee or agent of an employer or a principal who has liability insurance coverage. Does the employer's or principal's liability policy name the employee or agent as an insured?

2. Why does it matter? Take this all too familiar example: Trucking company driver is driving on the interstate under the significant influence of crack cocaine and causes a catastrophic accident. These facts clearly raise the potential for punitive damages. Assume further that the plaintiff has little or no chance of demonstrating that the employer trucking company had any prior knowledge or reason to know of the employee driver's use of cocaine while operating its trucks, and also assume that the truck driver is not an "insured" under the trucking company liability policy. In that circumstance, punitive damages is effectively a non-issue for the plaintiff because there is not a legal vehicle present to impose punitive damages against the employer trucking company and ultimately its liability carrier. Imposing punitive damages against a judgment proof employee driver is probably meaningless.

3. Under the same facts of scenario number one, assume that the employee driver is an "insured" under the company liability insurance policy. In that scenario, where an employee driver is very likely to have punitive damages awarded against him or her as an "insured" under the trucking company liability insurance policy, then under the current status of Texas law, the liability policy is triggered for punitive damages unless there is a specific exclusion in the policy excluding punitive damage awards.

4. Make sure the insurance carrier knows its own coverage. Believe it or not, settlement conferences and mediations occur where in scenario number two described above, the claims representatives come to the settlement conference or mediation not recognizing that the employee driver is an "insured" under the liability policy. Therefore, the claims representatives have evaluated the case --- at least as to punitive damage exposure --- on the basis that punitive damage liability cannot be established against its named insured, i.e., the trucking company, without recognizing that their real and direct exposure for punitive damages is via their "insured" employee.
driver. When this happens, a settlement conference or mediation fails.

To avoid this circumstance, plaintiff's counsel has to analyze the applicable liability insurance policy or policies and call to the attention of the liability carrier(s) through defense counsel or private counsel that your analysis of the insurance indicates the employee driver is an "insured" and the liability insurance policy or policies is, therefore, fully exposed for a punitive damage award.

DO NOT ASSUME THAT INSURANCE CLAIMS PERSONNEL HAVE CAREFULLY ANALYZED THE INSURANCE POLICY OR POLICIES IN THIS CONTEXT.

C. Is Insurance Coverage Counsel Involved for the Automobile or Trucking Liability Insurance Carrier?

If there has been a reservation of rights or an outright denial of coverage, insurance coverage counsel is probably involved particularly in serious automobile and trucking cases. If coverage counsel is involved, then in many, if not most circumstances, both retained defense counsel, plaintiff's counsel and the insurer(s) should consider the advisability of having coverage counsel present at the settlement conference or mediation. Many times in serious litigation, the success or failure of any settlement attempt may be significantly or even primarily influenced by coverage issues which may need to be assessed and addressed during any negotiation or mediation while the momentum to achieve settlement is high.

D. "Wasting" Policies

1. Some commercial automobile or trucking liability insurance policies contain provisions which reduce the applicable limit of liability as attorneys' fees and litigation expenses accrue.

If a valid Stowers demand is made on day one (i.e., within the then-existing applicable limits of liability), what happens if, during the Stowers demand time limit, the policy reduces or "wastes" below the Stowers demand amount? Many plaintiff's counsel are addressing this problem by making Stowers demands in which the amount of the demand is expressed as follows:

"One thousand dollars less than the applicable per occurrence limit of liability after reduction of accrued attorneys' fees and litigation expenses at 12:00 midnight on the date of expiration of this settlement demand."

2. From defendant's or plaintiff's perspective in serious automobile and trucking cases where potential exposure exceeds the applicable insurance limits, the timing of the settlement conference or mediation is often important. Where collectability of an excess judgment is doubtful, the plaintiff is probably incentivized to seek an early settlement conference or mediation before the policy limit is significantly eroded or "wasted".

Similarly, in a serious automobile or trucking accident case with liability exposure in excess of the applicable insurance limits of liability, defense counsel retained by the liability insurer and certainly the insured's privately retained counsel should be incentivized for early settlement conference or mediation in order to maximize the amount of money available to settle within policy limits.

3. In cases where the insured is not judgment proof and is able to respond monetarily to an excess judgment, the importance of privately retained counsel's role increases. In this circumstance private counsel should insist on being kept timely informed by the insurer and by defense counsel for the insurer of the following:

a. All oral and written settlement negotiations;
b. Any proposals or amendments to defense counsel attorney fee and expert witness budgets;

Obviously, privately retained counsel should urge settlement conference or mediation, and it is almost always advisable that private counsel attend and actively participate in a settlement conference or mediation.

V. MEDIATION AND/OR SETTLEMENT CONFERENCE CONSIDERATIONS

The success or failure of a settlement conference and to an even greater extent mediation is often measured by who is present and what type of presentations are made by counsel.

A. Who Should Be Present

1. From plaintiff's perspective, the plaintiff or plaintiffs should almost always be present. This is particularly true with a seriously injured surviving plaintiff. Many times insurance claims professionals and corporate representatives simply do not get a complete or accurate insight into the seriousness of a plaintiff's injuries until they see the plaintiff in person.

Similarly, in wrongful death cases and cases involving loss of familial consortium, it is almost always desirable to have all family members possessing claims present at the mediation. Their presence serves at least two purposes. First, it reminds the defense representatives of the number of damage
knows that such a circumstance exists, then permission in the decision making process. If plaintiff's counsel had a very positive influence in helping the plaintiff(s) of cases where a nonparty family member or friend has member or friend present. I have mediated a number defense, it may be important to have a nonparty family group where a case is to be tried. This is particularly important where the family group been damaged as a result of the accident in question. Secondly, it allows the plaintiff's group to present a picture of all members of the family unit who have blanks the jury will have an opportunity to fill in. Secondly, it allows the plaintiff's group to present a picture of all members of the family unit who have been damaged as a result of the accident in question. This is particularly important where the family group looks like what the jury will look like in the venue where a case is to be tried.

In some cases, if agreed in advance by the defense, it may be important to have a nonparty family member or friend present. I have mediated a number of cases where a nonparty family member or friend has had a very positive influence in helping the plaintiff(s) in the decision making process. If plaintiff's counsel knows that such a circumstance exists, then permission should be sought from defense counsel prior to the settlement conference or mediation for attendance by the nonparty family member or friend. Defense counsel normally should embrace this idea.

2. From the defense perspective, consideration should be given to several different types of persons who should be present and participate in a mediation or settlement conference depending on the circumstances. The defendant or defendants, or in the case of a corporate defendant, its corporate representative, should normally be in attendance and participate. This is particularly true where the defendant or defendants are exposed to an excess judgment. They (and advisedly their privately retained counsel) should be present, should participate and should make their settlement desires clearly known to the insurance claims personnel.

Additionally, the insured and/or privately retained counsel cannot have an accurate understanding of what settlement offers were or were not made at the conference or mediation if they are not present and do not participate. This understanding and information may become very important in the event of an excess judgment which results in some form of Stowers or other extra contractual litigation.

Insurance claims professionals and/or corporate claims representatives with full authority should also be physically present at the settlement conference or mediation. Attendance via telephone by this group of defendant representatives is almost always a bad idea and substantially decreases the likelihood of settlement success. Similarly, sending a token claims professional or corporate risk representative to a settlement conference or mediation is likewise almost always a mistake. In this circumstance, the person(s) actually making the settlement decisions are not present and not actively participating. In a mediation setting it is very difficult for the mediator to engage in meaningful negotiations with a claims professional or corporate risk representative by telephone.

3. To avoid not having the necessary people present, it is advisable for plaintiff's counsel and defense counsel to confirm in writing who (and in what capacity) will be attending any settlement conference or mediation. In the mediation context, many cautious plaintiff's and defense counsel actually have language inserted in a court Order for referral to mediation, identifying who or what type of persons or representatives must be physically (as opposed to telephonically) present at mediation.

B. Type of Presentation --- Plaintiff

1. Many of you have sat through very long and drawn out plaintiff presentations at settlement conferences or mediations, and many of you may have come away with the same conclusion as I have that those types of presentations are not particularly effective. As a mediator having watched many hundreds of plaintiff mediation presentations, I find that the most effective ones are concise, to the point and audibly and visually demonstrate all material liability and damage points from the plaintiff's perspective.

Power Point presentations that meet the above criteria can be very effective. The use of video deposition excerpts, visually accompanied with the written question and answer, can be very persuasive. Where the plaintiff has favorable liability testimony from DPS or law enforcement officers and/or favorable damage testimony from treating physicians, the use of this technique works well. Remember, don't automatically assume that claims professionals or corporate representatives have detailed information about what these witnesses testified to on deposition. Certainly, you cannot assume they have viewed any video depositions. Therefore, plaintiff's counsel may well be showing the defense decision makers very important liability and/or damage testimony for the first time.

2. Should Plaintiff Speak at the Settlement Conference or Mediation?

With the right type of plaintiff and under the right circumstances, counsel should consider having the plaintiff speak. This is a particularly important consideration in an early settlement conference or mediation prior to plaintiff having given his or her deposition. Many times it is very fruitful for the claims professional or corporate representative to hear and see directly from a seriously injured plaintiff how an accident has affected his or her life. Assuming that considerations of modesty and personal respect can be accomplished, it is often advisable for a plaintiff to actually show any permanent scarring or disfigurement at the settlement conference or mediation. This in
person demonstration can be much more powerful and meaningful to observers than simply looking at a picture.

In the presentation, visually showing each of the damage special issues that will be submitted to a jury can be particularly effective. Sometimes the defense decision makers simply do not have a full perspective of how many opportunities the jury will have to award damages. This visual demonstration can drive that point home.

Likewise, visual demonstration of relevant, favorable jury verdicts in and around the venue in question can have a positive impact on the defense decision makers.

C. Type of Presentation --- Defendant

Most of the considerations stated above in connection with plaintiff’s presentation are applicable to defendant's presentation.

The following are specific defendant presentation considerations:

1. As a matter of practice, most plaintiff's counsel do not write detailed case analysis or deposition reports to their clients, whereas most defense counsel do exactly that. Therefore, from the defense perspective, do not automatically assume that the plaintiff(s) know about defendant-favorable liability, damages or case law facts. While plaintiff's counsel has probably informed their client of these matters prior to any settlement conference or mediation, sometimes the plaintiff(s) need to see and hear firsthand a good defense lawyer telling them how these matters adversely affect plaintiff's case.

2. We all know in many instances that plaintiff's settlement expectations greatly exceed plaintiff counsel's recommendations. Therefore, plaintiff's counsel may actually want a defense presentation to drive these points home to his or her client.

3. A defense presentation demonstrating to plaintiff, visually and audibly, the number of parties other than the defendant against whom fault can be assessed, as well as the monetary effect of that assessment of third party fault, can be very effective. Again, plaintiff's counsel has probably already advised their client of this risk; however, actually seeing and hearing it from a defendant's presentation can make the reality of third party liability sink in.

D. Informing the Mediator

In order to be effective in a serious automobile or trucking accident case, a mediator must be prepared and informed. The more complicated the case, factually and/or legally and the more significant the damages, the more a mediator needs to be prepared and informed. This should happen in both of the following ways:

1. Good mediators request detailed factual and legal confidential submissions in advance of the mediation in an effort to be fully prepared on the day of mediation. In complicated automobile or trucking accident cases, premediation preparation by the mediator is absolutely essential. The disputed and undisputed facts of any accident must be fully understood by the mediator, as well as the damages and underlying judgment collectability issues.

Many successful mediators believe that part of their job is to explain, as a completely neutral third party, what they see as the positives and negatives for each side of the case. To do that in a believable and convincing manner, a mediator must have a command of the issues.

The first opportunity to be prepared usually arrives with the mediator's receipt of the plaintiff or defendant confidential premediation statement of position. Counsel should consider including any or all of the following in their submissions:

   a. Factual recitation of contested and uncontested facts and pertinent case law;
   b. Pertinent deposition excerpts;
   c. Pertinent liability insurance information including coverage disputes;
   d. Significant expert witness reports;
   e. Contractual documents that define relevant legal relationships between the parties;
   f. Important investigative information;

Confidential premediation conferences by counsel for either side with the mediator are certainly appropriate. While receipt of any confidential premediation statement of position is normally the starting point for the mediator, in some cases it can be very helpful for the mediator to have an introductory or telephonic confidential conference with either plaintiff's counsel or defense counsel. If a case presents particular nuances or problematic issues, it may be very helpful to a mediator to initially listen to what counsel has to say and then give counsel recommendations on what should be submitted to the mediator for preparation and/or what communications should take place with opposing counsel prior to the mediation.

In a serious automobile or trucking accident case, a mediator who does not request any written premediation submissions or who limits a submission to a one or two page summary warrants concern on the part of counsel.
2. The next opportunity for the mediator to become prepared is at the mediation opening session presentation. When plaintiff or defense counsel is trying to drive home pertinent points to opposing counsel, those points should also be directed to the mediator. Only when the mediator is properly armed with the "pressure points" from both sides, can he or she effectively use those points in the negotiation process. Put another way, the mediator should be reasserting key points made by plaintiff to the defendant group and vice versa.

E. Hostile or Personal Attacks

Every trial lawyer has their own unique style in handling settlement negotiations, case preparation and in dealing with opposing counsel. Making highly personal attacks on opposing counsel or parties and engaging in hostile or threatening rhetoric during the mediation process is generally a detriment and not beneficial in mediation. When counsel or party representatives engage in that type of conduct in the mediation process, there is substantial risk that what might otherwise have been a successful mediation will be unsuccessful. Effective trial lawyers and party representatives can be firm in their positions and be effective, tough negotiators without engaging in this type of conduct and without running the risk of creating unnecessary distractions such actions almost always creates.

F. Don't Give Up

1. Many automobile and truck cases do not settle at mediation. There are many reasons this occurs. Some of the more common are:

   a. One side or the other was not presented with pertinent liability or damage information in sufficient time to formulate proper settlement decisions prior to the mediation.
   b. One side or the other uses the formal mediation proceeding as more of an investigative or exploratory tool as opposed to a serious negotiation; OR
   c. New facts are learned or developments occur at mediation which require one side or the other to re-evaluate settlement decisions.

When these types of issues result in the initial mediation not being successful, the process may still ultimately be successful. Many times mediation negotiations should continue either by telephone or through resumption of subsequent mediation sessions. The more serious, complicated and higher damage the case, the more likely the requirement for post-initial mediation negotiations.

2. Whenever a case does not settle at mediation, the parties should consider and a mediator should advocate that mediation be adjourned or recessed (rather than concluded) in anticipation of future telephonic or formal mediation negotiations. Many times when the mediator reports to the judge and indicates that a case, although not settled at mediation, has been recessed or adjourned pending expected future negotiations, the Court will consider adjusting scheduling and/or ruling on pertinent motions in order to give the mediation process more time to work. Some Courts will also consider referring a case back to formal mediation.

3. Successful mediators simply do not give up on the mediation process when signals have been and are being sent by the parties that there is still some chance of settlement. In the situation where a mediation is recessed or adjourned, counsel should insist that the mediator initiate contact with opposing counsel sooner rather than later after the formal mediation session to keep the negotiation process going. It is also incumbent on the mediator to adequately memorialize what took place at the mediation so that he or she can initially keep the process going by telephone, and if necessary, schedule subsequent mediations.

   In my practice, I have seen serious, complicated high-damage automobile and truck cases successfully negotiated over extended one month to ten month periods, and what seemed like a near hopeless situation at conclusion of the first formal mediation ends up many months later as a successful final settlement.

   In considering selection of mediators, counsel should inquire of the mediator's time availability and commitment to continue negotiations post-formal mediation. Counsel should further ask how the mediator intends to handle post-mediation negotiations and his/her prior success in doing so.

VI. MULTIPLE PLAINTIFF & MULTIPLE DEFENDANT ISSUES

The very nature of the United States highway system, particularly the Interstate highway system, results in multiple automobile and/or trucking vehicle accidents resulting in multiple plaintiffs and/or multiple defendants being involved in a single case involving a single occurrence. The multiple party situation presents significant issues for settlement consideration for parties on both sides of a case.

A. Multiple Plaintiff Issues

Multiple plaintiff issues are presented when multiple plaintiffs are represented by the same counsel, represented by separate counsel or a combination thereof. Multiple plaintiff issues are also presented
where there is inadequate insurance coverage and/or judgment collectability problems.

1. Aggregate Plaintiff Offers:

For the purpose of a discussion in this portion of the paper, it is assumed that plaintiff's counsel has appropriately individually evaluated and assessed the value of each individual plaintiff's claim under the circumstances presented by the case.

Why would or should plaintiffs' counsel representing multiple plaintiffs or multiple plaintiffs' counsel representing separate plaintiffs want to consider negotiating with a defendant group by making aggregate settlement demands in a settlement conference or mediation? One reason is a situation presented when the aggregate value of the plaintiffs' claims significantly exceeds the amount of available insurance coverage or the amount of reasonably anticipated judgment collectability. The initial plaintiffs' consideration here is that the defendant group might choose to exhaust its available insurance coverage or available judgment payment money by settling with some but not all plaintiffs, thereby leaving the non-settling plaintiffs in an untenable position.

Another reason to consider making an aggregate plaintiff offer is that while plaintiffs' counsel and the defendant group may have similar views of aggregate settlement value, they most likely have different views of individual plaintiff claim value. Thus both plaintiffs' counsel and the defendant group run the risk of undervaluing or overvaluating a particular plaintiff claim, thereby sending an unintended signal to the other side regarding evaluation.

Inherent in most aggregate plaintiff settlement demand negotiations is the existence of an underlying agreement among the plaintiffs and their counsel as to how the settlement proceeds will be prorated. Reaching this agreement often makes it desirable to premediate with the plaintiff group, particularly where many plaintiffs' counsel are involved, to try to reach a proration agreement. The main benefit of premediating in this situation is to keep the mediation in chief focused on settlement of all the plaintiffs' claims with the defendant or defendants, and to avoid essentially having two mediations going on at the same time --- negotiations with the defendant or defendants at the same time negotiations are taking place between the plaintiffs. A proration agreement among plaintiffs may have several components such as:

a. The plaintiff or group of plaintiffs has the right to opt out of the proration agreement under defined circumstances.

b. The agreement may be contingent upon the defendant group being willing to negotiate with the plaintiffs on an aggregate settlement demand basis.

c. The agreement may specify a floor or ceiling amount of money to which the agreement applies. As an example, until the defendant group offers a certain floor level of money, then the agreement is not triggered. Or, after the defendant group offers beyond a ceiling level amount, the agreement is no longer triggered.

Perhaps the most compelling reason to consider aggregate plaintiff offers is the situation where there is inadequate insurance coverage or uncertain or inadequate judgment collectability. The underlying assumption in this scenario is that plaintiffs' counsel have concluded there simply is not enough insurance coverage or judgment collectability from the defendant group to meet the reasonable settlement value of the aggregate plaintiff claims. Therefore, the goal of plaintiffs' counsel is to get the maximum amount of available insurance money or non-insurance money on the table and avoid the risk of piecemeal settlement that excludes one or some of the plaintiffs.

Similarly, the goal of a defendant group is to accomplish a universal settlement that utilizes limited settlement funds in such a way as to end the litigation and attendant risk of settling with some but not all of the plaintiffs.

In this scenario, plaintiffs' counsel should consider the aggregate plaintiff offer approach even in the absence of a proration agreement. When there are inadequate funds available to begin with, then factors such as "wasting" insurance policies may dictate that plaintiffs aggregate their demands in order to get the maximum amount of available settlement money on the table even without a proration agreement.

In the absence of any proration agreement, then plaintiffs' counsel should consider a universal signed plaintiffs' acceptance of the defendant group settlement offer with the funds being placed in an escrow account or the registry of the court. Thereafter, the plaintiffs can litigate in court or agree to arbitrate the proration among the various plaintiffs. In my mediation and arbitration practice, on a number of occasions I have seen many very good plaintiffs' counsel enter into a type of "fast track" arbitration agreement that provides an early, streamlined and cost efficient means of allocation of the settlement amount among plaintiffs. These "fast track" type arbitration agreements usually provide for early arbitration, no additional discovery, a significantly reduced evidentiary presentation to the arbitrator and the binding nature of the arbitration.

In the case of minor or incompetent plaintiffs, if binding arbitration is desired, then a court-appointed
2. Guardian Ad Litem Involvement

In the settlement context, we normally envision a scenario where minors or incompetent plaintiffs are involved and a settlement is reached, and, thereafter, a guardian ad litem is appointed by the Court to approve settlement on behalf of the minor or incompetent plaintiff. This often occurs in the multiple plaintiff situation where the parents have a claim separate and apart from the claim of the minor or incompetent plaintiff, necessitating the independence of a court-appointed guardian ad litem to look out for the best interests of the minor or incompetent plaintiff. However, defense counsel may want to consider having guardian ad litem involvement in the early stages of the settlement process.

Often the defendant group may believe, and rightfully so, that plaintiff's counsel and/or the "next friend" representative plaintiffs are not properly analyzing the liability case or the damage case, and therefore, are making unreasonably high settlement demands. This, of course, poses the risk to the minor or incompetent plaintiff that settlement cannot be accomplished and/or that trial of the case may result in a bad verdict for the minor or incompetent plaintiff, vis-à-vis the level of money the defendant group is ultimately willing to offer.

Court appointment of a guardian ad litem prior to the settlement conference or mediation, and thus participation by the guardian ad litem in the actual settlement conference or mediation, may be just the strategy needed to reduce unrealistic settlement expectations. The guardian ad litem is in the unique position of complete independence and to act only in the best interests of the minor or incompetent plaintiff, free of contingent fee or other considerations.

Many times guardian ad litem fees are charged as court costs, which are paid by the defendant group, and obviously, involving the guardian ad litem at an early stage of the proceedings will cost money; however, these additional ad litem costs may be significantly less than the risks and costs of trial avoided through the active involvement of the guardian ad litem.

3. Settlement With Some, But Not All, Plaintiffs

Generally, the settlement goal for the defendant is to accomplish a universal settlement with all plaintiffs completely ending the litigation at hand. However, there are circumstances where such a universal settlement cannot be, or should not be, accomplished. Some examples of those situations worthy of consideration are as follows:

a. In the multiple plaintiff counsel situation, one plaintiff's counsel or group of plaintiffs' counsel may be better prepared, better financed or have substantially better abilities than other counsel. If the defendant group senses that one or some of plaintiff's counsel are being carried or pulled along by other counsel, then partial settlement should at least be a consideration. The result of such partial settlement may be a later, more favorable defendant group settlement with the plaintiffs represented by the less prepared, less financially able and lesser ability plaintiffs' counsel.

Even if such a later settlement cannot be accomplished, the defendant group may have nonetheless lowered their risk in any ultimate trial of the case by eliminating other plaintiff's counsel.

b. In many multiple plaintiffs' situations, one plaintiff or a group of plaintiffs' claims simply may be more dangerous and with much higher verdict potential than other plaintiffs' claims. In this situation, the defendant group may want to consider the strategy of settling the more dangerous plaintiffs' claims, leaving the less dangerous claims to be settled later --- perhaps under more favorable conditions or tried to verdict with a much more acceptable risk factor.

B. Multiple Defendant Considerations

For the same reason set forth above, serious automobile and trucking cases routinely involve multiple defendants. Particularly in multiple vehicle occurrences on major Interstate and U.S. highways in Texas, any of the considerations applicable to the multiple plaintiffs scenario are equally applicable to the multiple defendants scenario. In addition, some considerations that are specific to multiple automobile and trucking cases are as follows:

1. Applicable Insurance Limits & Collectability

As early as possible in development of the case, plaintiffs' counsel must ascertain the available limits of liability insurance and/or collectability of various defendants vis-à-vis one another. Obviously, any successful settlement strategy from plaintiff's perspective is going to be dictated in great part by how good a case plaintiff's counsel can develop against the defendant or defendants with the highest available liability insurance limits or judgment collection resources.

If applicable liability insurance information is not adequately disclosed in a defendant's initial response to
plaintiff's initial discovery request, then plaintiff's counsel should consider immediately seeking court intervention. Beginning significant case preparation and certainly beginning the oral deposition discovery process without a clear vision of the defendants' applicable liability insurance limits or judgment collection resources is fraught with problems for plaintiff in later settlement negotiations.

2. Aggregate Defendant Group Settlement Offers

Sometimes, but not often, a group of defendants in a serious automobile or trucking accident case can agree to make aggregate settlement offers. Much as in the aggregate plaintiff settlement offer considerations, one potential benefit to aggregate defendant group offers is that it avoids the risk of either plaintiffs or defendants sending unintended signals to the other about the defendants' relative settlement responsibility vis-à-vis one another.

An aggregate defendant group settlement offer concept may be approached with or without a written allocation agreement. While desirable, in reality the obtaining of a written, comprehensive allocation agreement among the defendant group prior to settlement conference or mediation is not likely; however, once in the settlement conference or mediation, I have seen the defendant group make aggregate settlement offers on an offer-by-offer basis. In other words, agreeing to a defendant settlement group offer allocation on move number one, does not bind a defendant group on move number two and so forth. The longer any defendant group can stick together in making aggregate settlement offers, the more likely the chances of securing a universal settlement for all defendants.

In the relatively few cases where the aggregate defendant group settlement offer concept works, it is generally because of a good bit of pre-settlement or premediation negotiations by and between defendant group representatives, many times with the guidance of a skilled mediator.

3. Settlement With Some, But Not All, of the Defendant Group

Most of the same considerations applicable to the defendant group settling with some but not all of the plaintiffs is applicable to the plaintiffs settling with only some of the defendant group.

Settlement with peripheral or less responsible defendants may be considered by plaintiff's counsel to help finance litigation against the remaining defendant(s) and/or to set the stage for focusing attention on the remaining defendant or defendants in later settlement negotiations or in the trial of the case.

I have utilized the high/low settlement concept in several serious trucking case mediations. The usual scenario where this strategy can be effective is the situation where the respective trucking defendants are not cooperating, are not making aggregate settlement offers and are "pointing the finger" at one another. In this situation plaintiff's counsel might consider doing a high/low settlement with one or more, but not all, defendants, which would have the following goals and components:

a. Assuring a minimum and maximum amount of money the plaintiff(s) will recover from the settling defendant.

b. Incentivizing the settling defendant or defendants to assist in trial of the case in arguing the remaining defendant or defendants' responsibility.

In other words, in order for a settling defendant to be in the low level of a high/low settlement, they are naturally economically incentivized to help establish as much responsibility on the non-settling defendant(s) as possible.

In my experience, the accomplishment of a high/low settlement with some but not all defendants has resulted in later successful mediation efforts with remaining defendant or defendants without a trial.

VII. INDEMNITY ISSUES

A. Questions Arising From Indemnity Issues:

Sometimes commercial automobile and trucking cases present indemnification issues that significantly affect settlement strategies. This is particularly true in the oil and gas industry.

Example: Oilfield service company employee is riding in an oilfield service truck driven by his fellow employee. Their company employer is a subscriber under the Texas workers' compensation laws, and, as such, is immune in a non-death case for any direct liability for injured workers' injuries.

On the county road leading to the job site, an accident occurs between the truck driven by an oilfield service company driver and another truck owned by an owner/operator of the well where work is being performed and driven by the owner/operator's employee. The passenger employee in the oilfield service company vehicle is seriously injured as a result of this collision.

The oilfield service company has entered into a Master Service Agreement with the owner/operator which provides the following:

1. The service company will fully and completely indemnify and defend the owner/operator for injuries to the oilfield service company's employees, including injuries resulting from the sole negligence of the
owner/operator arising out of the scope of the Master Service Agreement work.

2. Requires that the owner/operator be named as an additional insured under the oilfield service company's commercial automobile liability policy.

Question: The injured service company employee passenger sues the owner/operator and its driver. What issues does this example present that will ultimately be relevant to both plaintiff and defendant settlement strategies?

a. Did the accident occur within the scope of the Master Service Agreement work, thereby triggering the indemnity obligation?

b. Has the owner/operator properly been added as an additional insured to the oilfield service company's commercial automobile liability policy as required by the Master Service Agreement?

c. If the indemnity and/or additional insured provisions are triggered, how does this affect the trial strategy motivations of the oilfield service company, the owner/operator and their respective insurers?

B. Answers to Above Questions:

1. There will in all likelihood be a dispute between the owner/operator, its insurer, the oilfield service company and its insurer as to whether the accident happened in the scope of the Master Service Agreement work.

2. If the owner/operator was not properly added as an additional insured to the oilfield service company's commercial automobile liability policy, then the owner/operator will be making a direct contractual indemnification claim against the service company (and probably a breach of contract claim) for failing to properly name it as an additional insured.

3. If it is determined that the oilfield service company does, in fact, owe indemnity or that its insurance carrier owes additional insured status to the owner/operator, then the oilfield service company and/or its liability insurance carrier will be naturally incentivized to say that the accident was completely the fault of the oilfield service company or its driver, thereby eliminating their indemnity or additional insured liability for the employee's injuries because of their workers' compensation subscribers' immunity.

Defense lawyers for the owner/operator (who will probably be selected by the oilfield service company or its insurer) will then be naming the oilfield service company as a responsible third party, trusting that the oilfield service company witnesses will accept responsibility on behalf of the oilfield service company, thereby relieving it or its insurers from the effects of the indemnification and additional insured provisions.

Obviously, this presents a significant departure from the normal defense motivations of the oilfield service company.

C. Dealing With These Types of Indemnity Issues in the Settlement Process

Settlement negotiations in an automobile or trucking case presenting the type of indemnification issues set forth above are quite challenging and difficult. The predictable dispute between parties to the Master Service Agreement and between their insurers means that settlement of the case-in-chief becomes dependent on:

1. Ultimate resolution of the indemnity and/or additional insured disputes -- many times via a separate declaratory judgment action; OR

2. An agreement by the parties to the Master Service Agreement and/or their insurers to jointly fund a settlement with plaintiff while reserving their rights against one another regarding the indemnification and/or additional insured disputes.

If the indemnity and additional insured disputes are not resolved via one of these two methods, having a settlement conference or mediation of the case-in-chief with these issues outstanding is doomed. Therefore, as a prerequisite to a settlement conference or mediation of the case-in-chief, knowledgeable plaintiff and defense counsel often insist on a settlement conference or mediation between only the parties to the Master Service Agreement and their insurers.

If this two step approach is utilized, sufficient time should be allotted between the settlement conference or mediation on the indemnification and/or additional insured issues and the settlement conference or mediation of the case-in-chief. Many times resolution of the indemnity and/or additional insured issues requires more than one mediation session or other significant post-mediation negotiations.

VIII. WORKERS' COMPENSATION LIENS & SUBROGATION CLAIMS

The existence of workers' compensation liens and subrogation claims complicates the settlement negotiation process and has to be considered by both plaintiff's counsel and defense counsel in formulating settlement strategy. (It should be noted that this paper does not attempt to address the much more complex issue of Medicare/Medicaid liens or the Medicare set aside regulatory scheme.)
A. Workers' Compensation Liens

Common problems with and strategies for dealing with workers' compensation liens include:

1. In Texas, a workers' compensation carrier has a superior lien against the injured plaintiff's cause of action against third parties. This lien allows the workers' compensation carrier the right to "first money" as to past indemnification payments made and medical benefits provided. Additionally, a workers' compensation carrier is entitled to a credit in the amount of the settlement or collected judgment to offset its obligation for future indemnity payments and future medical benefits --- "the holiday".

   In serious automobile or trucking cases with catastrophic injuries or death, the amount of past workers' compensation benefits and future workers' compensation benefits can be very significant. As an example, when an employee dies as a result of an auto or truck accident leaving a young spouse, that spouse is entitled to workers' compensation benefits for the rest of his or her life or until remarriage.

2. In the situation where an injured plaintiff or the spouse of a deceased plaintiff has the right to collect significant future workers' compensation benefits, plaintiff's counsel is often faced with the dilemma of simply trading workers' compensation dollars for settlement dollars in any settlement of the automobile or trucking case, and with settlement dollars in the auto/truck case probably being burdened with a contingent fee. In this situation, unless the amount of settlement greatly exceeds past and anticipated future workers' compensation benefits, then the injured plaintiff or his/her spouse may not receive a net economic benefit from the settlement after repayment of the past workers' compensation benefits and taking of the credit or "holiday" by the workers' compensation carrier on future benefits.

3. In order to avoid the potential negative impact of the workers' compensation lien on settlement negotiations, plaintiff's counsel and to a lesser extent defense counsel must involve the workers' compensation carrier in the settlement negotiation process from the very beginning. Not involving the workers' compensation carrier is a mistake.

   As an example, if plaintiff's counsel negotiates a tentative settlement with the defendant group and then, for the first time, involves the workers' compensation carrier to negotiate settlement of its lien, the results are generally not good for plaintiff. On the other hand, when plaintiff's counsel involves a workers' compensation carrier at the outset of negotiations, the chance is enhanced of obtaining a discount on reimbursement of past compensation benefits and also obtaining some type of relief on the credit or "holiday" for future workers' compensation benefits.

   Obviously, one of the dialogues plaintiff's counsel will want to have with the workers' compensation carrier involves pointing out any weaknesses in the plaintiff's case, including the risk of a bad result at trial, in an effort to convince the workers' compensation carrier to negotiate its past and future lien position.

   Although it is many times difficult to do, it is an advisable practice to have the workers' compensation carrier and/or its attorney present at any settlement conference or mediation so that the workers' compensation carrier can see and hear firsthand the defense position regarding the deficiencies in plaintiff's case. Additionally, negotiating with a workers' compensation carrier in person, utilizing the momentum of a formal settlement conference or mediation, is a much more positive scenario than trying to negotiate by telephone with someone in a claims office.

4. Has there been a waiver by the workers' compensation carrier of its statutory lien? It is not uncommon in the Master Service Agreement/oilfield scenario discussed above for the party giving the indemnity (the employer) to pay an additional premium on its workers' compensation policy requiring the workers' compensation carrier to waive its statutory workers' compensation lien. Discovery of such a waiver is often difficult as workers' compensation carriers are not always forthcoming in disclosing the waiver. The indemnifying employer is much more likely to give plaintiff's counsel the waiver information.

B. Subrogation Claims

The most common type of subrogation claim that arises in serious automobile and trucking cases is that of health insurance carriers who have a contractual subrogation right to the extent of any healthcare provider benefits paid to the plaintiff. Most of the considerations and strategies discussed above regarding workers' compensation liens are equally applicable to health insurance subrogation claims. However, it should be pointed out that getting a health insurance claims representative actively involved in settlement negotiations is very difficult. In my mediation practice, I have not often seen it successfully accomplished.

IX. CONCLUSION

Settlement considerations and successful settlement strategies in automobile and trucking cases - --- particularly serious cases involving catastrophic
injuries or death --- require strategic planning by both defense counsel and plaintiff counsel from the beginning of case development up to and including the final settlement conference or mediation.

These considerations and strategies also require a working knowledge of liability insurance, indemnification and workers' compensation lien/subrogation claim issues.

Creative and resourceful counsel, both for the defense and plaintiff, by providing accurate, detailed information and involving the right players in the right way and at the right time substantially increase the likelihood of success at the settlement conference or mediation stage.

I have attempted to identify and illustrate practical and actual litigation examples of automobile and trucking accident considerations and strategies; however, talented defense counsel, as well as talented plaintiff's counsel, along with a qualified mediator, will easily recognize that a particular accident case involving catastrophic injuries or death may require different approaches to settlement.

When confronted with the extensive types of issues discussed in this article, creative and novel approaches by counsel on both sides is of the utmost importance.