CIVIL PROCEDURE ARTICLES 2015

TO OPPOSE OR NOT TO OPPOSE A CO-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT: THAT IS THE QUESTION

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Defense attorneys are often presented with the awkward dilemma of deciding whether to file an opposition to a co-defendant's Motion for Summary Judgment or Summary Adjudication. Unfortunately, the consequences of conceding to a co-defendant's Motion are not absolutely defined under the law.

Foreclosure of the well-known "empty chair defense" is one repercussion of failing to oppose a co-defendant's Motion for Summary Judgment. The "empty chair defense" is codified in California Code of Civil Procedure Section 437c(l) and provides that, in personal injury actions, "if a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant … may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion." Accordingly, the Legislature has spoken and the law is clear that remaining defendants are barred from any "attempt to attribute fault to or comment on the absence or involvement of" the former defendant who escaped liability unscathed by way of summary judgment. A brief review of your favorite treatise or the cases citing to Section 437c(l) will reveal the myriad of authority which prevent the remaining defendants from "pointing the finger" at the empty chair.

However, case authority interpreting both Section 437c(l) (and its prior versions) and statutes pertaining to other motions, e.g., motions for non-suit, do not appear to prevent any remaining defendants from introducing information about the former defendant's involvement in the lawsuit or the incident giving rise to the lawsuit for other reasons.

In *Knowles v. Tehachapi Valley Hospital District*,[1] a hospital and physician were sued for medical malpractice. The hospital achieved summary judgment. The remaining physician defendant cross-examined the plaintiff's medical expert on the issue of causation by asking about equipment that was under the control of the settled-out hospital. The Court allowed the cross-examination and the Appellate Court affirmed, explaining it was not prejudicial error because the cross-examination was relevant to the issue of causation and the jury never reached that question on the verdict form.

In *Leal v. Mansour*,[2] a hospital and physician were sued for medical malpractice. The hospital was granted non-suit pursuant to California Code of Civil Procedure Section 581c(d), which prohibits remaining defendants from pointing the finger at a defendant who achieves a non-suit. At trial, the physician offered expert testimony that an object (a ventilator), under the control of the hospital, was the cause of the patient's death. The Court allowed the evidence and the Appellate Court affirmed, explaining that the statute "was intended to prevent bad faith practice of relying on a dismissed defendant to confuse the jury and attempt to avoid liability for one's own wrongdoing, the so-called 'empty chair' defense. The statute was not intended

[1] *Knowles v. Tehachapi Valley Hospital District,* 49 Cal.App.4th 1083 (1996).
[2] *Leal v. Mansour,* 221 Cal.App.4th 638 (2013).

to prevent a defendant from presenting, in good faith, relevant evidence related to a causative factor for which there is no culpable party."

Furthermore, the "empty chair situation" is akin to offering evidence of a settlement in order to prove fault of a former co-defendant – which generally is inadmissible except for impeachment purposes.[3] For instance, if a former co-defendant takes the stand to testify, the remaining defendants may introduce evidence of that party's settlement to show bias. Thus, if a former co-defendant takes the stand to testify, the fact that they escaped from liability by way of an unopposed Motion for Summary Judgment should be admissible for impeachment purposes, especially where they did not seek reimbursement for costs.

In conclusion, just because a co-defendant achieves summary judgment, counsel for the remaining defendant(s) should not give up all attempts to introduce the former defendant's involvement in the lawsuit or underlying incident either for substantive or impeachment purposes. Accordingly, defense counsel should never foreclose on the idea of attempting to inform the jury that there is an empty chair is in the courtroom.

[3] *Granville v. Parsons,* 259 Cal.App.2d 298, 303-304 (1968).

ENFORCING STAYS IN CIVIL MATTERS ARE NOT GUARANTEED EVEN WHEN CRIMINAL PROSECUTIONS ARE PENDING

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Introduction

The violent death of O.J. Simpson's wife in 1994 highlighted a legal issue that still challenges us today: when should a civil lawsuit be stayed if a criminal prosecution involving similar facts is pending concurrently with the civil action? Following Nicole Brown Simpson's death, her estate's wrongful death case against O.J. Simpson was stayed until the criminal case against Mr. Simpson was completed. As it turned out, he avoided a conviction in the criminal case but he was found liable in the subsequent civil trial.

Conventional wisdom suggests that stays of civil actions should be granted routinely where criminal charges are pending. Plaintiffs should like stays because it may be easier to win a civil lawsuit (where the evidentiary standard of proof is lower) if the defendant has been convicted already for the same tortious/wrongful act. Defendants should like stays because they do not want to waive their Fifth Amendment rights against self-incrimination when examined in the concurrent civil case.

However, although the conventional wisdom suggests that stays of civil actions should be granted for good cause like this, the courts do not always agree. Stays are often very difficult to obtain, even when Fifth Amendment privileges are asserted and there is a danger that lay jurors could misunderstand the legal significance of a defendant remaining silent under cross-examination.

Federal Court Standard

A leading U.S. Supreme Court case on this issue is *Colorado River Water Conservation v. United States*.[4] It held that a federal court may stay a civil lawsuit, essentially abstain from exercising its jurisdiction for a time, in favor of parallel state court proceedings when doing so would serve the interests of "[w]ise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation."[5] Exact parallelism between the two actions is not required; it is sufficient if the two actions are "substantially similar."[6]

Federal courts consider several factors in deciding whether to stay one proceeding in favor of the other:

- Whether the state court first assumed jurisdiction over the subject matter;
- The inconvenience of the federal forum;
- The desirability of avoiding piecemeal litigation;
- The order in which jurisdiction was obtained by the concurrent forums;
- Whether federal law or state law provides the rule of law on the merits;

[4] *Colorado River Water Conservation v. U.S.*, 424 U.S. 800 (1976).
[5] Id. at 818; see also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 15 (1983).
[6] *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989).

- Whether the state court proceedings are inadequate to protect the federal litigant's rights;
- Whether exercising jurisdiction would promote forum shopping; and
- Whether the state court proceedings will resolve all issues before the federal court.[7]

These factors apply whenever parties ask a federal court action to be stayed in favor of a pending state court action, regardless of whether one proceeding is civil and the other proceeding is criminal. The factors should be weighed in a "pragmatic, flexible manner with a view to the realities of the case in hand" and "with the balance heavily weighted in favor of the exercise of jurisdiction.[8] Federal courts are not easily persuaded to stay their actions unless there is a clear federal policy to avoid piecemeal litigation.

The presence of pending or future criminal proceedings is not necessarily an exception to the norm. This is because the U.S. Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings. "Nevertheless, a [federal] court may decide in its discretion to stay civil proceedings . . . 'when the interests of justice seem to require such action.'"[9]

> The decision whether to stay civil proceedings in the face of a parallel criminal proceeding should be made "in light of the particular circumstances and competing interests involved in the case." [Citation.] This means the decisionmaker should consider "the extent to which the defendant's fifth amendment rights are implicated." In addition, the decisionmaker should generally consider the following factors: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.[10]

Hence, do not expect that a Motion to Stay Proceedings will be readily granted in federal court. Federal courts typically decline to stay their proceedings unless there is a compelling reason to do so.

California State Court Standard

Some California state court actions must be stayed, and the court has no discretion to reject the stay, such as when the stay is ordered by a Federal Court or a higher state court, or when a stay is triggered automatically by filing of a bankruptcy petition in Federal Court.[11] Otherwise, Motions to Stay can arise when a party or witness in a California state court discovery proceeding or trial claims the Fifth Amendment privilege against disclosure of information which might tend to incriminate him or her under either federal or state law,[12] or under foreign law if the foreign country recognizes a similar privilege.[13]

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[7] *Moses*, supra 460 U.S. at 15-16; *Holder v. Holder*, 305 F.3d 754, 870 (9th Cir. 2002); *R.R. St. & Co., Inc. v. Transportation Insurance Co.*, 656 F.3d 966, 978-979 (9th Cir. 2011).
[8] *Moses,* supra, 460 U.S. at 16, 21.
[9] *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995).
[10] *Id*., at 324-325.
[11] California Rule of Court 3.650.
[12] *Zonver v. Superior Court*, 270 Cal.App.2d 613, 620-621 (1969); *Warford v. Medeiros*, 160 Cal.App.3d 1035, 1043 (1984).
[13] *Klein v. Superior Court*, 198 Cal.App.3d 894, 903-905 (1988).

Like federal courts, California state courts have discretion to stay civil proceedings until a criminal prosecution is terminated or until the statute of limitation expires on filing criminal charges. But a stay is properly denied where it would prejudice the opposing side, for example, by creating a risk that a Cross-Complaint against the party seeking the stay would be subject to dismissal for failure to bring the matter to trial within five years.[14] Furthermore, the mere threat of criminal prosecution does not by itself mandate the continuance of civil proceedings.[15]

Alternatively, the state court might not stay the entire civil action but may stay the discovery phase until disposition of any pending criminal proceedings (or until the statute of limitations has run on commencing a criminal prosecution), in order that the defendant is no longer entitled to claim a Fifth Amendment privilege.[16] This kind of stay is discretionary too, and defendants are not entitled to a blanket stay on Fifth Amendment grounds.[17]

Conclusion

While it may make sense that Plaintiffs and Defendants alike may want to stay a civil action while criminal proceedings are pending, the judicial reality is that federal and state courts do not always see it that way. Courts are anxious to keep their proceedings on track unless there is a significant risk of prejudicing constitutional rights. Thus, strong arguments should be made to seek a stay in order to uphold constitutional protections, but contingency plans should be made to proceed with civil litigation while asserting the Fifth Amendment privilege whenever necessary.

Note that Fifth Amendment protections apply only to individuals. Business employees who are sued as individual defendants may assert Fifth Amendment rights and they may seek a stay.[18] However, corporate and other business entity defendants have no Fifth Amendment rights and they are not entitled to seek a stay of any kind.[19]

[14] *Dwyer v. Crocker National Bank*, 194 Cal.App.3d 1418, 1342 (1987).
[15] *Fisher v. Gibson*, 90 Cal.App.4th 275, 284 (2001).
[16] *Pacers, Inc. v. Superior Court*, 162 Cal.App.3d 686, 689 (1984).
[17] *Fuller v. Superior Court*, 87 Cal.App.4th 299, 309 (2001).
[18] *Id.,* 87 Cal.App.4th at 309.
[19] *Avant! Corp. v. Superior Court*, 79 Cal.App.4th 876, 886-887 (2000).

DEAR EXPERT, CAN WE TALK? EXPERT WRITTEN OPINIONS AND THE ATTORNEY WORK-PRODUCT DOCTRINE

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What do you do when defense counsel prepares an expert for deposition, and the expert's opinions somehow include otherwise privileged information which defense counsel imparted when preparing the expert for deposition? In an effort to be thorough, the expert (hopefully unintentionally) discloses information which the defense is entitled to keep away from other parties.

California Evidence Code section 721(a)(3) states that an expert witness may be fully cross-examined as to the matter upon which his or her opinion is based and the reasons for all such opinions. Once the defendant calls an expert to the stand, the expert loses his or her status as a consulting agent of the attorney, and neither the attorney-client privilege nor the attorney work-product doctrine applies to matters relied on or considered in the formation of his opinions.[20]

The attorney work-product doctrine is stated, but not defined, in Code of Civil Procedure section 2018.030. That scope is understood according to the circumstances and conditions under which the work product of an attorney is discoverable. From this nebulous foundation, we shall explore whether and when expert reports are discoverable and when expert reports are protected by the attorney work-product doctrine.

The written opinion of an expert retained by counsel solely as a consultant, to aid an attorney in the evaluation and preparation of a case, and not designated as a trial witness, is entitled to qualified attorney work-product protection. This protection encompasses communications with the attorney, the consulting expert's reports, and the consulting expert's diagrams and/or drawings.[21]

The rationale for this protection of a consulting expert's opinions is to encourage parties to seek expert advice in evaluating cases. However, there are limits to this protection; hence, the qualified attorney work-product doctrine. The limits are largely based upon common sense principles. For example, a party cannot "corner the market" on experts by retaining all reasonably available experts as consultants; a consulting expert who inspected or tested an object or thing which is now lost or destroyed and unavailable for inspection and testing by an opposing party's expert, etc.

Once the expert is designated to testify at trial as an expert under Code of Civil Procedure section 2034.010, *et seq*., and after a demand for the exchange of expert witness information and reports, all reports containing findings and opinions that go to the establishment or denial of a principal issue in the case must be turned over to the opposing party.[22]

[20] *People v. Milner*, 45 Cal.3d 227, 241 (1988).
[21] *Williamson v. Superior Court*, 21 Cal.3d 829, 834 (1978).
[22] *National Steel Products Co. v. Superior Court*, 164 Cal.App.3d 476, 489 (1985).

Advisory reports rendered by an expert before that expert's designation as a trial witness do not automatically lose their protected status as attorney work-product once the expert is designated. These pre-designation writings and reports of opinions could remain protected after a demand for designation of experts because they often reflect the retaining attorney's mental thought processes, under whose direction the expert worked.

However, courts are willing to allow an opposing counsel access to pre-designation writings and opinions for impeachment purposes upon a showing of good cause. The California Court of Appeal held that there can be cases where the trial expert's reports and opinions as a consultant contain information that could be used for potential impeachment purposes and, in such cases, the court must weigh carefully the power of impeachment as a valuable tool in the process of truth ascertainment against the benefits of protecting the privilege of the attorney work-product.[23]

Reviewing courts have held that it will often be necessary for a judge to conduct a three-step *in camera* inspection of the report of an expert witness in order to rule on whether the report is protected by the attorney work-product privilege.

- Does the report reflect, in whole or in part, the attorney's impressions, conclusions, opinions, or legal research or theories?

- With respect to the portions of the report not excluded by the query above, (1) was the report made by an expert designated as a trial witness (in which case the report is fully discoverable) or (2) was the report merely advisory to the attorney (in which case, the report is conditionally discoverable if "unfair prejudice" to the part seeking discovery is shown?

- With respect to a report deemed advisory to the attorney, does "good cause" exist for discovery of the report outweigh the policies supporting the attorney work product privilege? For example, could the advisory report serve as possible impeachment of the expert's testimony at trial?

It should be anticipated that opposing counsel will seek disclosure of your expert's pre-designation advisory writings and reports of opinions. While a trial expert's pre-designation oral reports are not immune from discovery, a written report is concrete, can be passed to the opposing expert for comment and criticism, and will certainly arise during trial as impeachment material. If an expert provides any opinion in written form, those writings must be reviewed carefully before designating that expert as a trial witness and the cost of the possible discoverability of the writings must be weighed against the benefits of proceeding with designation of that particular expert.

Electronic messaging has made it easier for the busy expert to communicate with retaining counsel after office hours, between cases, and at other unconventional times and relieves the expert from having to make time in his or her professional schedule to speak with retaining counsel directly. However, these electronic messages are writings and unilateral writings at that. In the statement and reply format of electronic

[23] *Jasper Construction, Inc. v. Foothill Junior College Dist.*, 91 Cal.App.3d 1, 17 (1979).

messaging, it is foreseeable that it would be much easier to tweeze out expert opinion and statement from the retaining attorney's thought process.

Despite the ease and speed of electronic messaging, it remains our firm's practice to encourage and have direct conversations with our experts to preserve the natural jumble of questions and answers, revisiting of medical records and deposition testimony, and all the other innumerable things that underpin a good advisory conversation.

MEDIATION: THE ART OF RESOLVING CLAIMS GRACEFULLY

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In all my years of representing insureds at the request of insurance companies, I have learned that a closed file is a happy file. Mediation is an art form that enables many of the smallest, as well as many of the largest, claims to resolve in a way that makes everyone grateful for the outcome. I see that phenomenon even more now that I serve as a mediator in helping others to resolve their conflicts.

Mediation is as old as humanity itself, and is a standard form of conflict resolution in many legal systems throughout the world. Sadly, it used to be considered a form of escape from back-up courtrooms, and sometimes as a sign of weakness, which made mediation unfavorable to many litigants. There was a sense that mediation – because of its inherently confidential nature – was less than transparent and parties were deprived of their day in court.

But now the wisdom of operating outside the restraints of the traditional legal system is more accepted. There are many reasons why mediation can be preferable to traditional litigation. For starters, the parties set the rules and they remain in control of the process. They also might have economic concerns that mitigate against full-blown litigation. Perhaps they want to maintain a business relationship regardless of the dispute, and do not want litigation to disrupt that relationship. Mediation can even be used to overcome a portion of a dispute, leaving the remainder to be litigated.

There is no one-size-fits-all mediation model. The mediator and the parties are free to negotiate both the process and the eventual outcome. Mediation is a process in which "a neutral third person with no decision-making power intervenes in the dispute to help the litigants voluntarily reach their own agreement."[24] Courts can suggest that parties go to mediation, but parties may never be ordered to pay for private mediation over their objection.[25]

One reason why many claims arise is because of a breakdown in communication. Mediation helps to restore candid and purposeful communication, and evidentiary privileges protect parties from fearing that potentially self-incriminating statements will prejudice them if they chose to litigate their dispute instead.[26]

A key purpose of mediation is to share a loss as equitably as possible among the parties. However, remember that, with very few exceptions, mediation does not extend judicially-imposed deadlines, e.g., statutes of limitation and dismissal dates. So, be certain that mediation is the desired procedure before leaving litigation behind altogether.

[24] *Jeld-Wen, Inc. v. Superior Court*, 146 Cal.App.4th 536, 540 (2007).
[25] *Id*., 146 Cal.App.4th at 541.
[26] Code of Civil Procedure §1775.10; Evidence Code § 1115; *Garstang v. Superior Court*, 39 Cal.App.4th 84, 88 (1995).

OUT-OF-STATE PLAINTIFFS AND THE ILLUSTRIOUS MOTION FOR AN UNDERTAKING

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Whether it is because of our mobile society that more out-of-state plaintiffs choose to sue in California, or perhaps due to the general availability of the California court system, or even choice-of-forum provisions in contracts, the reality is that an increasing number of California lawsuits are filed by Plaintiffs who reside somewhere outside of California. One problem which arises is when the lawsuit is adjudged to be meritless, if not frivolous, and the transient Plaintiff leaves the state before the in-state Defendant can recover an award of costs and/or attorney fees as the prevailing party. Where does that leave the successful but out-of-pocket Defendant?

A remedy exists under Code of Civil Procedure Section 1030. When a plaintiff to a California-venued lawsuit resides out-of-state, the Defendant may file a Motion during the lawsuit for an order requiring the Plaintiff to post a bond so that the Defendant (if ultimately adjudged the prevailing party) may secure an award of costs and attorneys' fees. This statute has been found not to violate a Plaintiff's due process rights, for example, in a case where an Oklahoma-based Plaintiff filed a request for trial de novo after an arbitrator issued a defense award in a personal injury lawsuit.[27]

When served with a complaint from an out-of-state Plaintiff, one of the first items on your checklist after filing a responsive pleading should be an evaluation of the merits to decide whether it makes sense to file a Motion for an Undertaking. The Motion is straightforward with only two factual elements to prove: (1) the Plaintiff currently resides out-of-state, and (2) there is a reasonable possibility that the defendant will prevail on the merits. However, "straightforward" does not always mean "easy," and these Motions are not always granted thanks to judicial predilections.

First, the Defendant must show that the Plaintiff currently resides somewhere beyond the borders of California. This is not as easy question as it might appear because not all judges agree whether the legal standard for where a Plaintiff lives is their "simple residence," or their "domicile" if those are two different locations. "Actual residence" is the physical place where an individual lives currently, which can be very temporary or transient, depending upon the circumstances. This may be very different from "domicile," which is understood to be an individual's established, fixed or permanent legal residence.

Technically, the Defendant is not required to prove that Plaintiff is officially domiciled out of California, merely that he or she is currently living somewhere out of state. Yet, some judges want to know a Plaintiff's domicile for purposes of this Motion, since there appears to be more certitude in knowing one's legal domicile. However, this approach can be detrimental to the Defense if the Plaintiff is legally domiciled in California: a judge might deny the Motion simply because the Plaintiff is domiciled in California, if he or she also fails to appreciate the fact that a Plaintiff who physically lives in another state or another country may be far enough away to avoid paying court costs and attorney fees in the event of an adverse verdict. Perhaps to circumvent a miscarriage of justice, many Courts construing the statutory requirement of a residence are satisfied by

[27] *Shannon v. Sims Service Center, Inc.*, 164 Cal.App.3d 907 (1985).

knowing simply the Plaintiff's actual residence.[28] But there is by no means a unanimous consensus of this point.

The second factual prong of the Motion is to show that there is a reasonable possibility the Defendant will obtain a judgment in the action. Typically this prong is supported by an affidavit showing both the nature and amount of the costs and attorneys' fees that the Defendant either has incurred or expects to incur by the conclusion of the action. The affidavit should also present and discuss facts showing the critical defense(s) which the Plaintiff is unlikely to overcome.

As straightforward as this second prong sounds, some judges insist upon more than a mere factual showing; they want to see the entire defense case laid out for them. While Section 1030 expressly requires only a "reasonable possibility" that the Defendant will prevail, some judges elevate the standard to either a "reasonable "probability" or "likely certainty." The temptation in such circumstances is to present the entire defense case, but this might not be prudent under the law of unintended consequences since it also gives the Plaintiff a lot of free discovery into the defense case that might not have been obtained otherwise.

Hence, to evaluate one's likelihood of prevailing on a Motion for Undertaking, it makes sense to research the judge's track record in ruling on similar motions in the past to know what kind of evidence is required to prevail on the Motion. When in doubt, the defense should produce as much testimony and documentation evidence as possible to support the Motion, while realizing that doing so might disclose too much critical information early on. Nonetheless, a Motion for Undertaking can be a strategic tool in discouraging frivolous lawsuits filed by out-of-state Plaintiffs, both because the Plaintiff can be persuaded to dismiss their Complaint early on if they learn the inherent deficiencies of the case, and also because the Plaintiff must post a bond which might not be returned if the Defendant wins.

[28] See, e.g., *Myers v. Carter*, 178 Cal. App. 2d 622, 626 (1960).

MEDIATION TIPS FROM THE TRENCHES: WHY, WHEN, AND HOW TO RESOLVE DISPUTES SUCCESSFULLY

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Mediation is a useful tool that can be used at all stages of a claim in order to resolve litigated (or even non-litigated) matters. One of the distinct advantages of mediation is that it results in finality of the claim and removes uncertainty for all the parties involved. More importantly, it also results in cutting off potentially significant expert discovery costs and legal fees, and in some cases it can protect an insured party from the potential of an excess exposure.

In order for mediation to be meaningful and successful, it first must be determined whether a particular matter should be mediated at all. This is something that is determined on a case-by-case basis. In making that evaluation, different factors should be considered, such as whether liability is disputed between the parties, whether the alleged injuries and damages are relatively straightforward and understood by the parties, the number of parties involved in the dispute, plus the personalities of the parties and counsel involved in the claim. In essence, the key is to determine whether the parties have enough information and motivation needed to submit the dispute to a meaningful mediation session.

If liability is conceded, the damages and injuries are relatively straightforward, and it is simply a matter of evaluating the claim's settlement value, early mediation should strongly be considered in order to cap expenses. If liability is disputed, early mediation could still be advantageous so long as the parties have enough information in order to evaluate their respective strengths and weaknesses. Even if recorded statements or depositions have not been taken but there is sufficient documentation to make a reasonable assessment, mediation can still be a helpful tool in resolving the matter because the mediator can use the uncertainty of liability to persuade the parties to consider an early mutually-agreeable resolution.

Regardless of the merits of the claim, the parties need to select the right mediator. Mediators do not come in a one-size-fits-all model. In determining the specific mediator who should preside over a particular matter, multiple factors should be considered, including the type of case (e.g., minor damages versus catastrophic injuries), a simple fact pattern versus a more complicated one, and the potential settlement value versus adverse verdict range.

When selecting a mediator, there are a number of avenues available to you. If you are dealing with an opposing counsel with whom you have had successful results at prior mediations, it may be advantageous to use the same mediator again. If you have not had any prior mediation experience with counsel, then it is generally best for the parties to exchange names of reputable mediators to preside over the matter. You do not want to pick someone who is so defense oriented that it will undermine the confidence of the other side. Rather, it is best to pick neutrals who are regarded by both defense and plaintiff bars as someone will instill confidence in all parties that their respective positions will be evaluated appropriately.

In choosing mediators, one can either refer to a list of mediators used previously or else consider mediators available through mediation services such as JAMS, ADR, ARC or Judicate West in Southern California. In addition, there are other mediators, whether retired judges or attorneys who can also be useful.

Another option to consider is to check within your organization or local bar association to obtain names of reputable mediators.

It is also important to select the right personality to preside over the case. Depending upon opposing counsel and their client(s), it may require selecting a retired judge. Some parties and/or counsel seem to respond better to a retired judge who is coming from a bench perspective. Whether this feeling is justified or not, one should strongly consider the use of a retired judge if it will give another party that extra incentive to accept the mediator's perspective and evaluation.

In other instances, an attorney-mediator can be used effectively in order to resolve a matter. When choosing an appropriate attorney-mediator to preside over the matter, one should take into consideration the plaintiff and defense bars' perspective of the neutrality of that individual as well as the proposed mediator's knowledge of the law surrounding your particular claim.

All of these factors must be considered prior to mediation because mediation may be the single best chance to resolve the matter. In addition, the timing of a mediation session should be evaluated carefully because it can be very difficult logistically to bring all parties, counsel and other decision-makers to a mediation at a mutually convenient date, time and location. For example, there can be important travel considerations for attendees who live far away.

Even though all the logistics can be resolved, nothing can be more frustrating than to arrive at mediation only to find that one or more parties do not have enough information to proceed meaningfully. This regrettable scenario can cause positions to harden and become entrenched, particularly when extensive and expensive discovery must be undertaken after a failed mediation session which other parties attended in good faith, unaware of another party's predicament.

To avoid this problem, it is essential that all appropriate information be obtained in order to appropriately evaluate the potential settlement value as soon as possible. This evaluation should be forwarded to decision-makers beforehand, preferable 45 days or more prior to mediation. Also, counsel should submit confidential briefs and related information to the mediator, so that he or she has sufficient time to consider the parties' respective positions prior to the mediation session. Confidential information should be designated clearly as such, and counsel can decide at the mediation whether to allow the mediator to disclose it the other side in order to spur more negotiation.

Patience is critical while at the mediation session. The process can be one which is long and drawn out. However, that may be necessary for the matter to resolve, particularly if dealing with troublesome principals, multiple parties, or claims of extensive injuries/damages. Sometimes the mediator needs extra time with one or more parties to let them air their grievances before meaningful negotiations can begin. This allows them to feel that they are getting their day in court, which can be very helpful in getting a matter resolved at mediation. More importantly, it gives the principals a comfort level with the mediator and this will certainly assist in making them more receptive when the mediator begins making neutral recommendations regarding the settlement value of the claim.

During the mediation process, the parties may come to a standstill as to their respective positions on the evaluation of the settlement value. Depending on the stage of the mediation, it may be advantageous to consider the use of brackets. While sometimes brackets may cause some concern for both plaintiffs and defendants, they can result in a matter being effectively resolved. For instance, a bracket scenario may be

where a defendant agrees to extend settlement authority up to $100,000 if a plaintiff reduces its settlement demand to $500,000. Brackets can be used effectively in cases where a plaintiff arguably is overvaluing its claim (or a defendant arguably is relying too heavily on its defenses) or when it necessary to bridge the gap between settlement positions which are very far apart. An important consideration when using brackets is to be mindful of the anticipated mid-point. In the bracket example given above, the mid-point could be $300,000. It might not be either party's position to settle at $300,000, so brackets should be picked carefully in order that the mid-point is acceptable to everyone.

At the end of the process, it is hopeful that the mediation resolves all or a significant portion of the entire matter. If the parties are successful at reaching a partial or global resolution, it is essential that the parties confirm their agreement in a signed writing prior to leaving the session. While this may seem relatively straightforward, it is not uncommon for parties who have engaged in protracted settlement discussions to simply overlook this point. Memorializing the agreement can prevent a party with so-called buyer's remorse to disavow the settlement afterwards, because the signed writing allows other parties to seek a court order enforcing the terms of the settlement. Courts are disinclined to enforce oral settlement terms which they cannot verify.

For the reasons outlined above, mediation is a useful tool that can be used at all stages of a claim, whether litigated or not, in order to resolve the dispute. If used effectively, it not only can result in an efficient resolution of a matter, but also can cut off unnecessary legal fees and costs, and give parties protection from the otherwise uncertain outcomes associated with future litigation.