



The case for mediating wrongful-death actions

WHY MEDIATION CAN MAKE MORE SENSE IN WRONGFUL-DEATH CASES, AND HOW TO BEST PREPARE YOUR CLIENTS

Experiencing the death of a loved one is truly the only thing that is both universal and inevitable in our lives, and, most likely, the worst thing that any of us will ever experience.

I contacted many former judicial colleagues and attorneys when I prepared to write this article. Most expressed the following sentiment: “Mediating wrongful-death cases is like any other case, but they’re more emotional.”

Lawyers know the good reasons for settling a case: It gives your clients immediate certainty, control over the outcome, and finality. All were important factors in “normal” circumstances, before the civil courts were backlogged due to pandemic-related closures, and lawyers could count on jury trials proceeding on their set date.

In 2020, so many Americans – potential jurors – have experienced deaths of family members, friends, and co-workers directly due to the COVID-19 virus, or from the pandemic closures (e.g., delayed cancer diagnoses, lack of treatment for pre-existing diabetes and cardiovascular disease, drug overdoses, suicides) that death is now something we think about every day. This shift in perspective by so many among us is another compelling reason to mediate a wrongful-death case.

In addition to giving the litigants control over the outcome, and bringing prompt finality to the dispute, mediation has several distinct advantages over a public jury trial. First, mediation can be and often is confidential, so it protects the privacy of the participants. Second, essential components of due process for trial, including cross-examination and experts’ assistance, are not required in mediation. Indeed, frequently the parties never even see each other during mediations. Plaintiffs can speak freely and directly to the mediator about their loss. Defendants have the buffer of a separate (virtual) conference room to avoid unproductive awkward moments, humiliation or shame while discussing the merits from their perspective. Institutional clients also desire closure.

Finally, because the goal of mediation is resolution, a creative mediator may work with the parties to reach a solution that gives the plaintiffs closure that is more emotionally satisfying than monetary damages a jury can (but may not) award. There is the benefit of avoiding disappointment over value – what was *not* awarded – producing scars and not satisfaction despite the long road and risks. And that road could be longer still because of appeals and potential error.

Advance preparation for emotions

An attorney representing a client in a wrongful-death case is certainly mindful that emotions will be an important component of the mediation. Yet, emotions may impede settlement. Preparation for the mediation must go beyond simply explaining the mediation process and asking, “How are you feeling? Are you going to be okay?”



Time spent with your client before the mediation discussing the reality that the day will be an emotional one, and that strong emotions are a natural part of the process, will assist in achieving a resolution. Clients may feel “embarrassed” to show their emotions and may act as if they are “fine” when they really aren’t. A wide range of emotions is implicated in death, which your client may experience as the mediation session progresses.

Managing your client’s emotions at mediation is important because your client must rationally evaluate a settlement proposal, and rationally listen to the mediator’s discussion of any comparative fault by the decedent. Indeed, if the case does not settle, it will be decided by a judge or jury, who will make a decision based on the evidence and the law. The very first instruction jurors receive is that they must not let “bias, sympathy, prejudice, or public opinion” influence their verdict. (CACI 100.)

Is the client opposed to “settlement”?

It is also important that you determine your client’s feelings about settlement before the mediation...not just the amount of money, but the *concept* of “settlement.” Many clients look forward to not *looking backward*; no more rehashing the pain associated with death and the loss that is permanent.

Money is, of course, the only thing that a jury can award in a wrongful-death case. A jury cannot fire anyone, take away a doctor's medical license, or remove a product from the market. Yet, to a plaintiff, a wrongful-death case may be about more than the monetary compensation. Plaintiffs seek some measure of "justice" for the deceased, who suffered an untimely and unnatural death, and want to hold the defendant accountable. Plaintiffs may also expect, reasonably or unreasonably, that the wrongful-death lawsuit will bring about changes so that no one else suffers that type of death.

A plaintiff may therefore have a visceral opposition to the concept of "settling," that "settling" means "settling for less." "Settling" a wrongful-death case may induce further feelings of guilt, that "settling" is "surrendering" or "giving up" without a fight; or of anger, that the defendant somehow "got away with it" by not being held accountable in a public jury trial.

Other challenges arise because damages in a wrongful-death action are based on the "quality" of the relationship between the decedent and the plaintiff. Effectively preparing to mediate a wrongful-death case involves anticipating the range of emotions that may emerge in this context. Discussing with your client that these emotions are likely to emerge in the mediation session, and formulating a strategy together, will aid the decision-making process.

Emotion: Anger

By the time the case is mediated, the plaintiff may still have lingering feelings of anger toward the one who caused the death. The plaintiff may even have displaced anger toward the decedent, or someone else. Even if irrational, or unstated, this may also be an obstacle to settlement.

An example of displaced anger over loss was poignantly portrayed in the Johnny Cash biographical film "Walk the Line." When 12-year-old Johnny is out fishing, his older brother Jack is killed in

a sawmill accident. Their father blames Johnny for Jack's death, saying that the Devil "took the wrong son." Johnny Cash gave many interviews in his lifetime about the forceful impact of the death of his older brother, even though he was utterly blameless in causing his brother's fatal injuries.

An example of a wrongful-death case where the client's unstated anger may play a role is an action for redress of a fatal bus or auto-versus-pedestrian collision. In those circumstances, the person who actually caused the death, i.e., the bus driver, may or may not be at the mediation session. Often the participation of the bus company's representative and insurance adjuster is sufficient, and the driver is not compelled to attend. These variables – attendance by the tortfeasors – should be considered and discussed by the attorney and heirs.

In this example, perhaps your client is still so angry at the bus driver that even a chance encounter during a bathroom break at the mediation session could derail negotiations. The decedent's heirs could be so resentful that settlement and an agreed-upon division of the proceeds becomes unattainable. On the other hand, your client and all of the heirs may feel offended if the bus driver is not present and may have even expected a personal apology.

The pre-mediation phone call with the mediator can assist your preparation with your client. Ask who will be present on the defense side. Discuss with your client in advance whether the presence or absence of the person who caused the death would be an obstacle to settlement. The mediator would appreciate any helpful insights in this regard.

Further, your client might also be feeling anger at the decedent. But, because the reasons might not be fully rational, the anger will go unstated, but will still be present. The decedent may have been under the influence of drugs or alcohol or engaged in risky behavior. The death may have created financial insecurity due to inadequate life insurance; or have revealed secret,

reckless spending by the decedent. Death may even cause the revelation of marital infidelity, for instance, if both the decedent's wife and girlfriend visit the hospital during the decedent's final stay (something witnessed by a friend of the author, who volunteered at a prominent Los Angeles hospital during college).

If your clients are the parents of a child who has died, they may be angry at each other, with displaced anger and blame for the child's death. Nonetheless, at mediation, they may present a "unified front," and a sudden display of anger may seem to come from out of nowhere. Unanticipated feelings may be a hindrance to settlement, as a parent may believe that "settling" is, once again, failing the child, by "giving in."

Emotion: Guilt

Feelings of guilt after a relative's death, "natural" or otherwise, are common, because of the challenges and tensions in family relationships. In the event of a sudden and unexpected death, however, the survivors were unable to "make their peace" with the deceased.

Sherry Lansing, the former Paramount Pictures chairman and CEO, herself felt such unresolved guilt. When Sherry was eight years old, her father wasn't well. Her family did not have air conditioning, and late one night, while Sherry was asleep, her mother helped her father out to the porch off her bedroom. Sherry shouted, "Oh, Dad, be quiet. You woke me up." He died later that night of a heart attack at age 42. Sherry said that her last words to her father and her tone "have hung over me my entire life." While losing her father so suddenly taught her to seize opportunity, Sherry related, "I also never liked to leave disagreements unresolved. Subconsciously, I was afraid the other person might die before we patched things up." (Myers, Marc. "When Hollywood Executive Sherry Lansing Learned to 'Pull Up Her Socks,'" *Wall Street Journal*, July 5, 2017.)

As the wrongful-death case focuses on the effect of the loss of the surviving

family members, plaintiff may experience guilt at the mediation. Yet, because the guilt may be irrational (e.g., plaintiff referred the decedent to the doctor, whose medical negligence killed the decedent), it may be unstated and, therefore, an obstacle to settlement.

Emotion: Shame

The decedent's manner of death may even evoke feelings of shame amongst the survivors. For example, there is a stigma attached to suicide in many cultures and religious traditions. Or the decedent may have overdosed on drugs; the surviving family members may feel that their reputation is tarnished by the decedent's drug usage.

Have a realistic discussion about trial

Educate your client about goals of litigation based on the law of damages in death cases. Your mediation preparation should always include a frank discussion about the amount of money your client is willing to accept to settle the case. It should also include frankly discussing the evidence that the defense is going to try to admit, and that the court may likely admit, on liability and on damages.

Many clients do not appreciate that juries are *instructed* about what they can and cannot award at trial. The decedent's pain and suffering or even the emotional distress of those who are left behind is not a compensable element in most cases – elder and dependent adult abuse to the contrary – and counsel would be well served to address this in detail well before the mediation. Unrealistic expectations about the law countenances that are not corrected before the mediation will undermine the relationship between client and counsel as well as preclude sound conclusion.

CACI 3921 is the jury instruction for recoverable economic and noneconomic damages in a wrongful-death case. The potentially recoverable non-economic damages are for the loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support; the loss of enjoyment

of sexual relations; and the loss of decedent's training and guidance. The jury is instructed that “no fixed standard exists for deciding the amount of noneconomic damages.” Jurors are instructed to “use your judgment to decide a reasonable amount based on the evidence and your common sense.”

The jury is also tasked with deciding a person's life expectancy. While the civil jury instructions provide a table of average life expectancy, CACI 3921 instructs jurors that they may consider, “among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation.”

As part of pre-mediation preparation, it may be helpful to show the client jury instructions, and particularly 3921, to augment any explanation about what happens next if the case does not settle. That includes tutoring the client on the defense strategy of introducing evidence to the jury on these subjects in a light most unfavorable to the decedent and to the plaintiff.

The benefit of confidentiality

Here, the confidentiality of the mediation process itself may be a useful factor in settlement. Settling the wrongful-death case, particularly early in the litigation, before the defense has taken a “deep dive” into discovery and investigation, is an opportunity to preserve the dignity of the decedent. Settling a case means keeping details of a marriage, of a parent/child relationship, or of a sibling relationship, private.

When cases do not settle, all of the “warts,” substance abuse, marital infidelity, gambling problems, domestic violence and child abuse (including sexual abuse), periods of estrangement with children and other relatives, and the like – so-called “dirty laundry” – should be expected to be aired-out in a public trial. Betting on the success of (serial) motions in limine is something the client should be informed about before mediation takes place so it is not a complete and utter surprise that adverse facts may be

introduced to attack the credibility of witnesses and diminish the value of the case. Some clients are not appropriately educated about the discretion trial court judges have ruling on evidentiary issues in general. This could impede a mediated solution.

In addition, a wrongful-death jury trial with the saintliest of decedents is still emotionally challenging and draining for the plaintiff. As noted above, the plaintiff may still have lingering feelings of anger and guilt. The slightest deviation from expectations about what the jury would do may leave another devastating, lifelong scar.

Many people form impressions of what jury trials are like from television or movies and may have never seen the inside of a courtroom before a trial. Describing the reality of the courtroom and the experience of a trial is an essential part of preparing your client for mediation.

Every trial lawyer knows that, whereas mediation allows the parties to take control over the process and experience immediate finality, a jury trial is the opposite. Strangers are summoned to serve as jurors to decide the case and to place a dollar amount on the life of the deceased. Some counties and courthouses within the county are more notoriously conservative than others. These features are the landscape of trials and should be discussed to alert the client it is the furthest thing from a 60-minute television show or movie. It could be the story of what happens to their life and no one knows the ending until it is announced in the courtroom.

During the trial, the plaintiff should expect to be there at the trial, promptly, each and every day, sitting emotionless at counsel table, stone-faced, no matter what is being said about the decedent, or themselves.

The author presided over a wrongful-death medical-malpractice trial, brought by a deceased patient's widow and adult children. One of the adult children appeared on one day, to give her testimony about her father and her

parents' marriage, but then never returned. Her mother and siblings, however, never appeared in the courtroom, much less gave any evidence by testimony.

Plaintiff's counsel was experienced and competent. He presented the evidence effectively and was aided by a highly qualified medical expert. He acted professionally and with civility at all times. Standing solo at counsel table, he delivered a compelling closing argument. Yet, the jury's defense verdict was not surprising.

Post trial: The ultimate loss of control

Of course, even winning a case is not the end. If the jurors return a large verdict in favor of the plaintiff, the defense may bring a post-trial motion, asking the judge to reduce the verdict, or reverse it altogether. There may be an appeal, which may last years, after which time the verdict may be reversed, and the case must be retried.

Alternatively, the plaintiff could recover something, but less than the settlement offer, and may be responsible for the other side's post-offer and expert costs. If the jury renders a defense verdict, the plaintiff may be devastated from the loss, as if the decedent's life meant nothing. Worse, a cost judgment will inevitably follow. That could have even more ramifications; the furthest thing from closure.

Unlike the outcome of a trial, mediation is a flexible (attorney and) client-driven process that provides opportunities for creative settlement. In addition to monetary awards, other redress may be obtained. For example, the defense may agree to surrender a license, or to create a memorial, or a scholarship fund, in the memory of the deceased. Apologies can be expressed without recriminations. Mediation may be an opportunity to honor the memory of the deceased in a way that a jury verdict cannot.

Know the decedent

Get to know the decedent, not just the heirs, prior to the mediation. It is

essential that plaintiff's counsel obtain objective information about the decedent, apart from what plaintiff has stated. For example, if the decedent is an adult who was not living with the plaintiff, the plaintiff may not have a complete picture of the decedent's life. Further, because of the trauma and suddenness of the loss, the plaintiff may be reluctant to offer up anything less than a rosy view of the relationship with the decedent. This might not be intentionally deceptive, but rather, part of the human tendency to try to remember the good times with the deceased instead of the bad, particularly when a loved one suddenly and unforeseeably dies.

Here are some suggestions for pre-mediation research. Because of the language of CACI 3921, these things may be considered relevant, and therefore admissible, at trial. Due to privacy laws, a signed release from plaintiff, or even a court order, may be required.

Research the decedent's online presence, and search the internet for social media pages, online forums, and the like.

Check the Superior Court docket for any family law filings ... separation, dissolution, and domestic violence, in all jurisdictions where the decedent resided, as well as state and federal civil and criminal filings, and federal bankruptcy court filings. Count on the defense having done so.

A spouse can file for dissolution or separation, even multiple times, and never serve the petition on the other side. So, your client may be unaware that the deceased spouse filed for dissolution. If your client or the deceased spouse filed for a domestic violence restraining order, you must obtain those records and be prepared to discuss these issues with your client before the mediation. Again, given the language of CACI 3921, the plaintiff surviving spouse should expect evidence regarding the "quality" of the marriage to be admitted at trial.

Obtain the coroner's report, and any medical records (including paramedic reports) or toxicology records that may

exist if the decedent sustained fatal injuries but did not immediately die.

Obtain the decedent's school records, both academic and disciplinary. If you are not able to obtain the records, ask your client about the academic history. Was the decedent ever disciplined? For what? Did the decedent take a year off of college? Why? Conversely, many are modest about their achievements in college, graduate and professional schools, so there is also a positive explanation to obtain copies of these records.

Investigate the decedent's work history. If you cannot obtain documents, ask your client. What is the work history? Was it erratic? If so, why? Adult children might not tell their parents why they left a job; perhaps the decedent told her parents that she quit a job when she was instead fired for stealing, or for excessive absenteeism ultimately attributed to a substance abuse problem. On the other hand, colleagues at work may offer a perspective about the decedent family members were either unable to appreciate or simply assumed was a quality shared by everyone. These neutral non-party witnesses can make a big difference in the outcome of the case. Most times the other side in a mediation will accept the offer of proof – but never in trial.

Give your clients a voice with a "day in the life" video

A "day in the life" video created for mediation can be a highly effective tool in facilitating settlement. The focus of the wrongful-death case is the effect of the loss caused by the defendant. At mediation, however, it may be unlikely, and possibly outright counter-productive, for the plaintiff to talk directly to the defendant, about the loss. The video, instead, can convey just what the decedent meant to the plaintiff.

The author saw a particularly effective "day in the life" video at the mediation of a wrongful-death action involving a young boy who had been run over and killed while crossing in a marked crosswalk. The plaintiffs never saw the defense lawyers or the defendant at the

mediation, but “spoke” to them in the video.

One of the most memorable scenes was an interview with the surviving brother, who talked about missing his brother, and gestured to the empty bunk bed in the room they had shared. Although the surviving brother was not present, his voice was clearly heard at the mediation.

Pick the right mediator

Counsel often focus on the type and merits of their cases but some attention and consideration should be paid to the “skill set” of the mediator and how he or she will connect with the parties. Generally, most litigants want to be heard, but especially so in a wrongful-death case. Speaking openly at the mediation is the opportunity for the plaintiff to address the feelings of sorrow, anger, guilt, and perhaps even shame, in a confidential proceeding, free of cross-examination by the defense, or “judgment” by the jury. Whether the relationship with the decedent was wonderful or strained, the plaintiff will want to talk about it.

Mediators are people – obviously – and some have a better disposition for accounting and finance disputes than for the emotional travails of a death case. This is not casting aspersions, but the reality of mediations that many parties are paying over \$5,000 and \$10,000 to conduct. The wrong mediator is a waste of time and money, to say nothing of the fracturing that occurs when expectations are dashed.

It is important that you select a mediator who will listen to and build a rapport with your client, so when it is time to honestly discuss the shortcomings or weaknesses of the case, whether on liability or damages, and the merits of attaining a reasonable settlement, plaintiff will be a receptive listener.

Rifts amongst the plaintiffs

Prepare for the possibility of rifts amongst multiple plaintiffs, even though allocation of settlement funds is not an issue for the mediator to decide.

California allows only one wrongful-death action. All heirs at law should be joined. Thus, it may include “the decedent’s surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession. If the parents of the decedent would be entitled to bring an action under this subdivision, and the parents are deceased, then the legal guardians of the decedent, if any, may bring an action under this subdivision as if they were the decedent’s parents.” (Code Civ. Proc., § 377.60.)

Although a trial contemplates a separate award of damages for each of the heirs at law, a mediated settlement of the whole can be distributed with the supervision and authority of a Superior Court judge or by contract during mediation.

The California Supreme Court dealt with the issue of dueling settling plaintiffs in *Corder v. Corder* (2007) 41 Cal.4th 644. The decedent was married to Plaintiff; Defendant was his adult daughter from a previous marriage. Eight months after his marriage to Plaintiff, the decedent was killed in a construction accident. The wrongful-death action was settled for an unapportioned lump sum of \$1.1 million. Ultimately, the widow and daughter disagreed on apportionment, and a separate civil suit was filed.

The California Supreme Court approved of apportionment disputes being resolved by way of court trial and observed:

Just as a defendant “has no interest in the division which the plaintiffs may make among themselves, or which may be made for them, of the damages recovered” in a wrongful-death trial (citations omitted), so, too, the division of a lump-sum wrongful-death settlement is of no concern to the settling defendant (citations omitted). (*Corder v. Corder, supra*, 41 Cal.4th at 659.)

Preparation may reveal a potential allocation dispute amongst multiple

plaintiffs. The best practice is to inform your clients that the defendant’s interest in the mediation is to settle the wrongful-death case for a lump sum, and that neither the settling defendant nor the mediator will allocate the settlement funds amongst plaintiffs. A settlement demand made at mediation will be made collectively, on behalf of all plaintiffs; and the settlement agreement will be between the plaintiffs collectively and the defendant. Pursuant to *Corder*, any outstanding dispute regarding allocation of settlement funds may be determined by the court.

That is, apportionment issues should not hold up a settlement with a defendant at mediation, but it is helpful for plaintiffs’ counsel to be aware of the potential issue.

Conclusion

The unforeseen and often sudden deaths that give rise to a wrongful-death lawsuit are devastating events for the surviving heirs. Thorough preparation for a mediation can improve the chance of success, as those in the process can engage in sensitive and creative negotiations. Further, the plaintiff will believe that a settlement is not dishonoring the memory of the decedent, but rather the mediation confidentiality helps preserve the decedent’s legacy, including respecting the privacy and dignity of familial relationships. Finally, from the chaos created from the decedent’s death, the plaintiff who settles the wrongful-death case exerts control over the process, and certainty of the outcome. With hope, settlement also helps brings closure.

Judge Elizabeth Feffer served on the Los Angeles Superior Court for 13 years, presiding over more than 75 civil jury trials, more than 500 civil bench trials, hundreds of evidentiary hearings, and numerous settlement conferences. Now a mediator, arbitrator, and private judge with ADR Services, Inc. Judge Feffer handles a diverse range of complex cases with novel legal issues for resolution and finality. ☒