# What Goldilocks and the Three Bears can teach us about mediation

By Robert M. Tessier

*Once upon a time there was a lawyer with a tort case. It was a good case, and she thought that when the time is right there is a very good chance of settling it if the defense comes to the table in good faith.*

Your first big question about any good personal injury case is whether you want to settle it, or bypass any ADR process such as mediation and spend your valuable time and energy gearing up for trial. It is beyond the purview of this article to help you make that decision, but assuming you and your client come to the conclusion that it makes sense to make a good faith effort at settling the case, a decision needs to be made as to when to mediate, what information to provide to the defense, and how to negotiate.

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## When is the Best Time to Mediate?

> *Goldilocks came in through the front door. The first thing she saw and smelled was the sweet, steamy porridge. 'I sure am hungry,' Goldilocks said. 'I'll just have one bite.' First, she tried a spoonful from Papa Bear's great big bowl. 'This porridge is TOO HOT!' Next, she tried a spoonful from Mama Bear's medium-sized bowl. 'This porridge is TOO COLD!' Finally, Goldilocks tried a spoonful from Baby Bear's tiny little bowl. 'YUMMY!' she cried. 'THIS IS JUST RIGHT!' Goldilocks ate the entire bowlful.*[1]

When to mediate is like when to eat the porridge.

When is it too soon to mediate? If there are too many unknowns about your case, or your client is not fully healed, and all of the losses and harms are yet to be fully understood, then wait. Uncertainty about all of your client's injuries and harms can result in your client's case being undervalued.

However, often a carrier or defense attorney identifies a case that they believe is best considered for mediation either pre-litigation or very early in the life of the case (after initial written discovery). If you believe that your client's case is ready to settle at this stage (harms and losses well fleshed out and stable, liability issues agreed to), then it is reasonable to talk. Any experienced mediator will tell you that when the defense suggests an early mediation, they intend to come to the table in a good faith effort to settle the case in almost all cases. Failed mediations this early normally are the result of missing pieces of information on one side or the other, but are virtually always worth the effort in the grand scheme of things. This is because a good mediator will assist in crafting an efficient discovery plan and follow up after that to get the case settled.

But all else being equal, the optimal time to approach the subject of mediation with the defense in most cases is right after the plaintiff's deposition.

That is a key time in the life of the case from the defense perspective. Shortly after the plaintiff's deposition, the defense lawyer normally reports back to the insurance carrier about the case, the impression of your client, and provides advice about the issue of mediation and future work to be completed on the file, along with an opinion of case value.

A face-to-face discussion with just you and opposing counsel following the plaintiff's deposition is a very important moment. If at all possible, be prepared with an opening demand to communicate at this point. At a minimum be prepared to talk ranges of value of this or similar cases. Your prior verdicts or a verdict search for past similar cases can also be helpful to share with opposing counsel. Just like in trial, you want to be the first person to "anchor" the value of the case. If you don't make a demand by this time, the defense attorney will be left to value the case for whatever they believe the case is worth based on their experience. Most often, that is not the only anchor you want the insurance carrier to hear

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early on for a variety of reasons.

Some lawyers express concern that bringing up the subject of mediation is somehow a sign of weakness. I disagree, particularly when the subject is broached at the conclusion of the plaintiff's deposition. The best way to bring up the subject is simply to ask opposing counsel these three questions in a post-deposition discussion:

1. Do you think your client/carrier would be interested in mediating this one?
2. If so, is there any further information/documentation you believe I could provide you to complete your analysis so that we have a decent chance of settling this case?
3. Do you have a list of names of mediators that you and your carrier would agree to?

Remember, when you have a case that you and your client believe can and should be settled for good money, treat helpful information/records/reports as ATM cards. You put a favorable doctor's report or earning loss document in the machine (i.e., providing it to the carrier), and money comes out. Holding back helpful information about your case would have to serve some very important strategic interest to keep it off the table if you want to get maximum value at mediation.

Conversely, when is it too late to mediate? Experienced trial lawyers and mediators have seen cases that end up being tried because both sides have spent so much money preparing the case (mostly expert expenses) that there is no viable economic way out. Likewise, there are some cases, such as product liability and medical malpractice matters, which are heavily expert driven. Lawyers in those cases know that many times expert depositions need to be at least started before it makes sense to seriously talk settlement.

However, in the majority of cases that cannot be settled immediately following plaintiff's deposition, that period of time after lay witness discovery completion and the beginning of expert discovery is the sweet spot. Somewhere between two and three months before trial often makes the most sense for all sides.

### What Information Should I Give the Mediator, and When?

> '*I need to sit down for a little while to rest my sore feet!' Goldilocks thought. First, she sat in Papa Bear's great big armchair. 'TOO HARD!' she screamed. Next she sat in Mama Bear's medium-sized chair. It was so soft that she sunk in! 'TOO SOFT!' she complained. Finally, she sat in Baby Bear's tiny little rocking chair.* 'JUST RIGHT!'

Goldilocks' Chair is the information exchange before mediation.

In a perfect world, (call it Baby Bear's rocking chair) most mediators prefer both sides to be open to exchanging information with each other, be it formal briefs or letter briefs, in advance of the mediation, with exhibits. Then, if there is any confidential information that the lawyer wants to share with the mediator, this can be done separately with an email, or confidential submission. You would be surprised how effective this simply strategy can be! It saves time, provides clarity, and can be an effective reality check for each side.

But not everyone likes Baby Bear's chair.

Probably the hardest position to put the mediator in is to hand carry into mediation a 3-inch thick brief chocked full of exhibits that is marked "confidential." The mediator is left to either spend up to an hour at the start of the session reading everything, a couple of minutes quickly skimming everything, or simply carry everything around for the length of the mediation to pump up their biceps. If at all possible, get the key materials to the mediator at least the day before the mediation. Just about every mediator is in the 21st Century now and can receive briefs in PDF format.

> Just like in trial, you want to be the first person to "anchor" the value of the case.

The other question is how much paper to give the mediator. In personal injury cases, the best practice is to have all the pertinent records available (either by sending ahead of time to the mediator, or having available at mediation) but providing the key documents you want the mediator to study and know intimately somehow highlighted for the mediator. In personal injury cases, studies like MRI's, neurologic tests, operative reports, and well-documented life care plans/economic analyses are invaluable.

On the other hand, reams of nurses' notes, chiropractic sign-in sheets, or illegible handwritten scribbles (also known as doctor's notes), unless vital to a unique issue in the case, are rarely necessary for most mediators in the typical personal injury case. Save a tree if you can and have them available in some other format during the session if by some off chance they become relevant.

### What is My Best Strategy in the Negotiation?

> *Goldilocks climbed up the stairs to find somewhere to sleep. First, she tried Papa Bear's great big bed. 'TOO HIGH!' she exclaimed. Then, she tried Mama Bear's medium-sized bed. 'TOO LOW!' she sighed. Finally, she tried Baby Bear's tiny little bed. 'JUST RIGHT' she said. Then Goldilocks fell asleep and dreamed dreams of warm cookies and milk.*

The Negotiation is the height of the bed.

Where to start, and how to position yourself in the negotiation for maximum benefit are critical points in the life of a mediation for both sides. A quick digression into negotiation theory will help to frame the issue.

Most negotiations have three phases: 1) an opening bid or demand that the other side believes is "way out of the ballpark" at a minimum, or "irrational" or "insulting" at the extreme; 2) a point at which each side sees the other as at the extreme end of a "zone of potential agreement" followed by a series of good faith/cooperative moves to close the gap, and 3) a final competitive phase when the parties are very close but fighting over small amounts of money or nibbling over additional terms/concessions. Given this reality, seasoned negotiators in personal injury cases are normally not deterred by an opening position that is out of the ballpark from their perspective. It is highly recommended not be to seen as irrational at any point in the process however.

Therefore, the most effective negotiators for plaintiffs frame their opening demand in an analytic way. The best briefs contain line items for the past economic harms, projected future medical care needs, past earning losses and loss of future earning capacity, and general damages past and future. Special damages should have written documentation or supportive reports whenever possible. (Remember: documents are ATM cards at the mediation) This makes sense for two reasons: One, this is how your opponent (insurance carriers) analyzes the value of your case, and two, at trial, this is how the jury instructions break down the damages recoverable by your client from a jury.

Let's consider a hypothetical case in which you and your client's target settlement range is $100,000, plus or minus ten percent. An opening demand at $200,000 or even $300,000 is being considered. While there are many variables such as policy limits, your client's feelings, and negotiation style of your opponent to consider, it is doubtful that a start at $200,000 would offend your opponent or cause the carrier to believe you are irrational. You need room to move, but must also not cause your opponent to lock up because your starting point is too high. It can also be argued that starting too close to your target can make the negotiation difficult in the opposite way. With little room to move, the negotiation becomes frustrating and can break down.

Holding back helpful information about your case would have to serve some very important strategic interest to keep it off the table if you want to get maximum value at mediation.

Let's look at this same negotiation from your opponent's perspective. If the carrier believes the settlement value of your case to be $70,000 to $90,000 range, your start of either $200,000 or $300,000 (while looking like a reasonable starting point to you) can result in a different opening from the carrier, or the dreaded request to "bid against yourself" when it is believed the opening is out of the ballpark. It would not be unusual to see a lowball start, which can be insulting. Yet notice the big picture: this case should settle based upon each side's unrevealed evaluation. Nevertheless, each side will start the negotiation a bit miffed, and feeling like the other side is playing games. There can be a phase of the negotiation with small moves, frustration, and recriminations about bad faith tactics on both sides. But barring apocalypse, there will be a settlement of this case with a skilled mediator.

Negotiations like this are typical. Another day at the office for experienced mediators. But they can also be tough on your client unless the client is prepared for the initial phase of the negotiation.

Finally, in the negotiation try to avoid the last minute report or the 11th hour document dump right before mediation. Although experienced mediators have seen this scenario many times and have techniques to work with it if presented, remember that the defense, in most circumstances, is far less nimble than you are in the decision making process. If you believe that a fair evaluation of your client's case requires the defense to evaluate large future medical expenses and harms, or substantial loss of earning capacity claims, work that aspect of your case up well in advance (at least 2 weeks) of the mediation. Most carriers need at least that much time to give full consideration to evidence like this.

Carriers evaluate the information that they have prior to mediation to ascertain their settlement value or range of value. Therefore, it is very difficult to substantially "move the needle" in a mediation with an eleventh hour life care plan or economist's report of astronomical proportions based on unsupported assumptions. Rather than "scaring" the money out of an insurance carrier, the result of this tactic is normally the opposite – the defense backs away from the table. The new info will either be ignored, or the mediation fails because there needs to be another review of the file with a committee or manager.

### Conclusion

Not every mediation ends with dreams of milk and cookies. But Goldilocks knew how to get it just right. Hopefully these tips will assist you and your client in your next mediation. ■

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[1] Robert Southey, Goldilocks and the Three Bears, 1837, originally published in *The Doctor*.