SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

Mediation & Arbitration: Effective Case Management for Plaintiffs

PRESENTERS

Joseph C. Tonetti, Esq.

Program Coordinator: Sean Campbell, Esq.

Special Thanks to Our Sponsor:
The Jansen Group

March 23, 2016
SCBA Center - Hauppauge, NY

MEDIATION and ARBITRATION: EFFECTIVE CASE MANAGEMENT FOR PLAINTIFFS

JOSEPH C. TONETTI

Sponsored by: THE JANSEN GROUP, INC.

366 N. Broadway, PHE 6

Jericho, New York 11753

(joe@tonettilaw.com)

OPENING REMARKS

This program is tailored towards plaintiff's attorneys because, after 7 years, my belief is that there is substantially more resistance to or lack of knowledge regarding ADR on the side of plaintiff's bar, as opposed to the carrier's side.

Plaintiff's bar is not screaming for tort reform and caps. Carriers have been using ADR for 30 years and the fact that carrier's suggest it has probably put a negative spin on it for many plaintiff's attorneys.

(Example #1)

Show of hands - Plaintiff's attorney, how many have used, what % files go to ADR and what % cases are tried.

You don't need ADR if your practice consists of Labor Law cases with multiple over insured defendants, boardable 7 figures damages claims in the Bronx or Brooklyn, no threshold cases, no cases of questionable liability, no cases with $25k policies, no GEICO, Countrywide or American Transit cases and no UM/SUM case that may go to a certain AAA Arbitrator in Jericho. By the way Mediation sometimes works very will in multiple defendant, especially Labor Law cases, since when else will you get 4 or 5 defense counsel in one room where you don't' have to play divide and conquer on the phone and you can play divide and conquer through the Mediator.

In addition, I presume some of these defendants have had prior cases together and may already have a liability split in mind.

MEDIATION

Mediation is a non binding process whereby the Mediator assists the parties in reaching a settlement, but unlike an arbitration, the Mediator does not have the authority to make a binding decision. Mediation should be a process where both sides

proceed in a less adversarial fashion than trial or arbitration, with the goal being both sides working together with the Mediator to achieve a resolution. Mediators are bound to follow confidentiality rules in order to permit each side to reveal facts or circumstances of their case to the Mediator in order to encourage evaluation of the issues as part of the settlement process. Generally, if you've been a Mediator on a matter, you shouldn't be the Arbitrator on that matter if the case, ultimately, goes that route. You may instinctively consider issues/evidence that is not admissible or may have been revealed at the Mediation in confidence might not be presented at the Arbitration.

Having said that, I recently did just that, both sides agreeing apparently based upon the Mediation discussion that my range of evaluation was reasonable. In that case, the plaintiff himself had some "pie in the sky" concept of the value of his case.

Why ADR?

1. 90% of all BI cases are resolved by settlement, (generally accepted) the other 10% are either tried or resolved by Summary Judgment Motions, on threshold, lack of notice or other issues, none of which involve compensation to the plaintiff, but all of which guarantee financial loss to plaintiff's attorney.
2. ADR involves a relatively small financial investment and a limited amount of legal work, designed to effectuate a result that will produce a satisfied client, who will be a continuing source of advertising and referrals, i.e., a positive result.
3. In both Mediation and Arbitration, the client becomes involved in the process to the extent that <u>you</u> determine what will produce that positive result. Inherent in the concept of litigation is that there are clients who are ADR amenable and those who will not be for a number of reasons, involving personality, or their general dislike of lawyers and the legal process, as well as those who, at least, conceptually, believe extended litigation and possibly, trial is the best way to resolve their case. Even the few who think that, initially, usually become frustrated with the process, so why not include the possibility of ADR in the Intake process, or whenever you think its appropriate.

<u>ARBITRATION</u>

Arbitration with the limited exception of infant cases, is a binding process whereby the parties agree, in writing, to submit the disputed issues in a case, to the Arbitrator and to be bound by the Arbitrator's decision, without the recourse of the appeal process, other than those set forth in CPLR 7511, attached.

(Example #2)

The Arbitrator is empowered to resolve evidentiary issues before or during the proceedings, generally based upon the procedures set forth in the Arbitration Agreement as well as the Rules of Evidence, applied in a less stringent fashion than at trial, with a greater emphasis on fairness and equity.

Both Mediation and binding Arbitration are designed to limit expense and shorten resolution time. Think about how much time you spend going on conferences that are adjourned because you didn't supply a pharmacy authorizations. Think about ho much partner/associate time would be spent towards resolving the case. Once a carrier agrees to ADR a lot of discovery becomes irrelevant.

Example: Prior accident medical records, IMEs - carriers will rely upon another carriers NF IME or the ADR presumption that had an IME been conducted it would have been negative.

Preparation for either Mediation or Arbitration should be similar to trial preparation, insofar as addressing legal issues, including being knowledgeable of prevailing case law, as may be necessary to establish core issues, such as §5102 qualifying medical reports/affidavits, or at least to remove the argument that there is no doctor to substantiate same.

A. **Evaluating cases for Mediation:**

1. **Identifying cases for mediation:**

a. Cases may be submitted for mediation at any stage of the litigation process, including pre suit.

1. Pre suit Mediation can be effective, if you have all relevant medical records. These are often, but not necessarily, smaller cases without disputed liability issues. There is incentive to plaintiff's counsel to mediate these type of cases. From the carrier's point of view the saving of legal and investigative expense is a motivating factor, although most cases in this category are going to be handled by house counsel, whether the carrier considers legal expenses as a line item, i.e., house counsel, or as extraordinary expense, i.e., outside counsel can have a significant effect. If affects the carrier's willingness to use ADR, but usually has less of an effect on the resolution itself. I've seen carriers actually factor outside counsel fees into settlement negotiations and others firmly refuse to even consider it in the process.
2. Discovery stage or post note of issue - Cases where liability is clear but the parties differ on the value of the injury or cases where the parties are closer on agreement as to value but differ on the issue of liability. Arguing both at a Mediation can be difficult, or just time consuming, but an experienced Mediator, who is familiar with carrier and the plaintiff's firm can effectively deflect the parties from polarizing issues to the common goal of resolution of the case, due to upcoming trial expense or other trial issues, i.e., availability of witnesses, expert or otherwise.
3. Trial is imminent - Case where settlement negotiations have failed but both sides are motivated to resolve the case. Happens more often than you would think.
4. Multiple defendant/carrier cases - (a) Issues of liability as between defendants; (b) cases when carriers disagree on value, but not as much on a liability spilt and (c) cases with limited coverage on one or more defendants when the plaintiff may be left with insufficient coverage or (d) even where multiple plaintiffs exist and carrier(s) have tendered their coverage but plaintiff's cannot agree on a pro rata split. (Example #3)

2. **Settlement or Judge Days**

a. This type of day can be very productive in moving smaller cases. You can schedule multiple cases in one day. If you have enough cases with a particular carrier you can set up a day just with that firm and a mediator.
b. Another incentive, often ADR firms offer reduced rates, or don't adhere strictly to hourly billing on Settlement Days as an incentive to fill the day.
c. Inherent in these days is the "feeding frenzy" concept that a carrier is looking to settle a large percentage of cases scheduled and your case might receive a more "liberal" evaluation. "trading off" cases probably went out with 8 Track tapes, but carriers usually have a manager present or on the phone who can make decision without having to specifically justify "Why" in the claim file or will direct the claims representative how to write up the settlement.

B. **Selecting the Mediator:**

1.There are likes and dislikes as to ADR companies but more important than the company is the selection of the individual Mediator. If the type of food the ADR company puts out is the standard for your choice, you may be doing yourself, or your client, a disservice. Price can certainly be a consideration, since your client is footing the bill, but, hopefully, you didn't take the case anticipating losing money. On the other hand, mediating involves open ended time allotment, whereas Arbitration is predictable at least, time wise, since you should know how long your case and your adversary's case will take to present. Ultimately, price will always be a consideration since the goal is to produce a favorable result for the client, which more often than not, means what goes in his/her pocket. Heard of 4 hour, even all day Mediations, but I"ve never had one. Example

2. The majority of Mediators sit on more than one ADR company panel, however some ADR companies require that their Mediators be exclusive to that Company. Presuming that Mediator can maintain his/her neutrality, given the political pressure that may exist, there is nothing negative from the plaintiff's point of view. Traditionally, carriers have a limited number of approved vendors and favored Mediators, but both issues should be negotiable.

3. The best way to choose either, Arbitrator or Mediator if you don't have any experience to draw upon, is to contact other plaintiff's attorneys whom you trust, either directly, or through certain plaintiff's list serves such as Rogue's List. Mediator contests are annual political social media contests where Mediators call or E-mail or their friends, clients, whatever and a Mediation company proclaims this or that Mediator as whatever they come in the voting. I don't get involved, even though I work for at least one Mediation company that announces Top mediators.

4. If you have already chosen an ADR company or their carrier has boxed you into using a particular one, use that ADR company to try to "sell" the Mediator(s) that you are willing to use, to the carrier's representative. You can always tell them that you won't go to ADR otherwise.
5. Know enough about a Mediator's background to know if he can be completely impartial, such as his reputation as either a Judge or as a practicing attorney, including any relationship with defense firms. The ADR company should address any such concerns or issues with the Mediator directly, to your satisfaction.
6. The simple truth is that every Mediator/Arbitrator has relationships with plaintiff's attorneys, defense attorneys and carriers and their representatives that any reasonably suspicious mind could translate into a "potential" conflict, in the broader sense, but, if a Mediator can't "keep his eye on the ball" which is the settlement of the case, he shouldn't be doing ADR.
7. An important concept is never to say to the other side that "X" is the only mediator that I will use on this case. (Unless you have the rare instance where the other side really wants to mediate and says you can select the mediator). Think of the reverse. The other side says to you we want to mediate this case but only if you will use "Y". You would and should say that "Y" is the last person I will agree to use since they can present that Mediator possibly with others hearing what Mediators a particular carrier will and will not use, i.e. they have inside information.
8. If you want a particular mediator tell the ADR company and let them try to get that Mediator for you.
9. It is best if you can give the ADR company two or three acceptable choices, and let their representative do the legwork of trying to get your "preferred" Mediator. A good ADR company will try to get that Mediator assigned by using factors, such as availability, in encouraging the carrier to agree.

C. **<u>The Mediation Statement:</u>**

1. It can be important to do a Mediation Statement, but not mandatory, particularly if complex factual/legal issues are not involved.
2. You should include with your submission a synopsis setting forth your position on disputed issues. It should not be too long, some ADR companies bill automatically, for review, based upon the number of pages. Mediators in most instances, bill for review time, as warranted. For example, 150 pages of illegible or repetitive, or both, chiro or physical therapy records are not necessary, but the synopsis should include the duration and number of visits.
3. Include a list of your exhibits, if exhibits are necessary
4. The exhibits attached to your submission should be the key ones regarding disputed issues, i.e., photographs on slip and fall cases, highlighted medical records, etc.

5. Three ring spiral ring binders are impressive but not necessary. If you want to use them, be prepared to take them with you afterwards.
6. It is not necessary or required that your exchange your submission with the other side. In fact, many submissions are meant to be "Confidential" and should be so marked on the Arbitrator's copy.
7. Get your submission to the mediator prior to the mediation thru the ADR company.
    a. It lets the Mediator know what the case is about other than just the name of the case and whether its an MVA, slip and fall, etc.
    b. If you are the only side to submit a Mediation Statement it gives you the advantage of having the Mediator know your position in case you happen to leave something out on your presentation.
    c. Generally, it gives your client the feeling that you are fully familiar with the case. Example - Scott Baron.
8. Do not walk into the mediation with a huge binder and hand it to the mediator and say this is for you. A huge binder, is for trial or possibly Arbitration. Mediators don't try cases, hopefully, they settle them.

D. **Pre Mediation Negotiation and Issues**

1. Make sure you know the defendant's coverage(s), including excess policy(ies) depending upon the nature of the case.
2. It is helpful that you have given a demand prior to the mediation. The lack of demand is often a reason for some carrier(s) not to go to Mediation. Plaintiff's seriously interested in moving their cases should be willing to give a demand that at least sends a message to the carrier that Mediation might be fruitful.
3. It is always helpful to have received an offer before the mediation but it should not be a prerequisite presuming you have a good faith belief in the carrier's intention. An offer can send a message that entices Mediations, or simply suggests that it is a waste of time. If you don't have any history with a carrier/adjuster you should inquire.
4. Some plaintiff's take the position that they will only pay for the mediation if the case settles or that the carrier should pay for the mediation. This sends a message that plaintiff's attorney doesn't believe in the process, or doesn't trust the carrier, so why would either side go to Mediation. Seldom occurs most but when it does the plaintiff usually suffers from "battered wife syndrome". Cause: Too many Mediations with Park Insurance.

E. The Mediation:

1. Do's and Don'ts:

a. Do have your client present, get there on time or early if you need time to prepare the client.
b. Do ask if the adjuster is going to be present. Pre- suit or pre answer cases obviously require adjuster participation. It is helpful to ensure that the adjuster you have been dealing with will be the one present. Not only does he/she know the file, they have a vested interest in moving the case and reducing their pending. Post suit and counsel retained cases should require adjuster appearance, if possible. Defense attorneys, in house or outside counsel, have little incentive to resolve cases and having to reach an adjuster by phone, more often than not, results in delay and sometimes complete breakdown of the pending negotiations. The ADR company should be the vehicle for avoiding this problem. You are within your rights not to schedule a Mediation if the adjuster is not going to be present. Make it a condition to participating, but remember, the carrier has the same expectation regarding the plaintiff's appearance. If you know your client can't appear, they should be reachable directly or you should had a settlement discussion with them. Do not find out that your client has just started treating again or has a Medicare lien, or funding lien you didn't know about on your phone call from the Mediation.
c. Do find your comfort level with the Mediator. If you don't trust him, he is going to have a tough time resolving the case or even getting you to a place where the case can resolve post Mediation.
d. Do make your presentation fairly brief and succinct. This is especially true if you have given the mediator a submission. There are some mediators that will summarize their reading of your submission and simply ask if they have missed anything in order to save time. There will come a point in the mediation where you will need to "level" with the Mediator to let him or her know more or less what "your" number or, at least, your range, is to settle the case and what your client's expectations are. Your level of comfort in doing so may depend on your relationship and past experience with the Mediator. The Mediator needs to get a sense from both sides where the case should or might settle and give him or her the opportunity to work to get there.
e. Do not make the mediation a confrontational event. If you think you'll never have to deal with this adjuster again, you are wrong.
f. Do not be alarmed if the Mediator knows or is "friendly" with the other side. This can often work to your advantage, not against you. A Mediator who is "trusted" by both sides is an effective Mediator. That trust is usually based upon prior dealings with the attorneys and carrier's involved.
g. Do not interrupt the other side when they are making their presentation, the Mediator is not a jury. If there are flaws in the other sides presentation, factually, or on a legal basis, you can bring those to the Mediator's attention when you are speaking

privately with the Mediator and that may assist the Mediator in altering/softening the other side's position. If your bring it out with both side's present, you have limited or removed the Arbitrator's ability to effectively use it in his private discussion with your adversary.
h. **Do not** attend a mediation where you only intend to slightly reduce your demand, unless there is a compelling factor, i.e., a $25k policy or possibly where the adjuster has suggested that the Mediator's recommendation might increase his authority closer to your number.
i. **Do not** come to a Mediation without a working knowledge of the facts, depending upon how much discovery has been done and think about what you want the other to know about or not to know about.
j. **Do/Do not** have your client sit in on the initial presentation. In the 7 years it has happened twice, once recently.
Good Example - Mike Montgomery
Bad Example - Bob Glick
(Example #5)

2. In General

a. Mediators differ in their approach regarding making "recommendations" as to the right settlement number. My approach is that my opinion has little value unless it is objectively clear that one side or the other has failed to address an issue, legal or factual, which can have a significant effect on negotiations and then, it should only be addressed with the party perceived to be operating under the misapprehension. Generally, plaintiffs attorney have more flexibility at Mediations, since a carrier's claim file has generally been evaluated on a regular basis, committeed, etc. A Mediator's opinion may influence a carrier's evaluation, but, almost certainly will not change their authority at a Mediation. It may cause a post Mediation re evaluation and hopefully, settlement or maybe a phone call to a supervisor.
b. It is rare that a mediation is or should be considered a waste of time, especially when both sides have adequately prepared. Many cases that do not settle at the mediation settle at a later point because of the mediation process.
c. If the case does not settle, many Mediators are willing to follow up after the mediation with phone calls or e-mails to assist in bringing about a resolution. Some charge, some don't, the ADR company usually controls that.
d. Some cases necessarily require a second mediation to bring about a resolution, usually because unanticipated medicals have surfaced, or possibly one side or the other has heard something at the Mediation which substantially changes their outlook requiring a lengthy discussion with their client, or, in a carrier situation, i.e., re-representation to supervisor, committee, etc.
e. Remember that when a case settles at the mediation, the mediator has done a good job when both sides leave with

something less than a celebratory attitude. If you feel that the Mediator has somehow gotten you a number that was above you, or your client's expectations, save the celebration for the office, because that Mediator has to deal with that carrier, or their representative, again. With any luck, it will be another of your cases.

f. Most carriers have their own closing papers with Medicare, etc. language and cannot accept your Blumberg General Release, even with Hold Harmless language in your cover letter. A few still do.

g. Mediation Settlement Agreements, as well as Arbitration Agreements are enforceable in a Court of competent jurisdiction, meaning, if you agree to Arbitrate its an enforceable contract. If you agree to settle, with or without your client's signature on the document that case is settled. The phrase "Subject to client Approval" is a slippery slope.

ARBITRATION

Arbitration is similar to a trial as to presentation of evidence to support your client's position except that evidentiary standards are generally reduced.

Both sides should understand and accept this concept as part of their written agreement to arbitrate. The submissions of each party will include all evidence that you wish to be considered. You will facilitate the Arbitration if you follow up with your adversary after exchanging submissions to see if the other side intends to object to anything submitted. Obviously, working those issues out prior to the Arbitrations saves times and saves the Arbitrator making a ruling at the Arbitration which could adversely impact either side's case.

Simple Question: Do you want a significant piece of evidence supporting your position not to be considered or the reverse, something against you coming in during the Arbitration, and even worse, while your client is present?

If you haven't worked it out, at the very least address it with the Arbitrator before the actual Arbitration starts.

THE ARBITRATION STATEMENT/PACKAGE

Time for Exchange and Issues that arise:

1. The written Arbitration Agreement in most instances, will spell out and control the timing of submissions, customarily ten (10) days before the hearing date.
2. In pre suit situations, carriers generally have their attorneys appear, especially if its house counsel, however, a small % of carriers will hire outside counsel to represent them at the Arbitration. You need to know this, because, you don't want an attorney who is either a former ADA or an outside counsel who is trying to win favor with a carrier, showing up with his teeth bared, making your life and your client's life a living hell on the issue of time to exchange or admissibility of some portion of your submission.

(Example #4)

3. In post suit situations, attorneys always appear but you probably have already conversed with the attorney during litigation and know what you are dealing with and whether the adjuster is appearing. If you haven't discussed with and evaluated the other attorney, you're not doing your job, because your client is going to be cross examined, on liability or damages, or both. In most instances, the client has agreed to Arbitration as an alternative to a trial, for reasons of expense, informality, guarantee of recovery and not having to deal with a defendant's attorney who has drank the Koolaid and wants to get his pound of flesh from your client who has escaped the rigors of trial, including his cross-exam tutorial in front of a jury. For you, what is important is keeping your eye on the ball, i.e., a satisfied client, not a 55 year old housewife who would rather have discontinued her case than having dealt with the defendant's attorney's questioning. Have some idea what you are walking into especially if you are sending an associate.
4. An experienced Arbitrator will recognize situations like this evolving and de charge the atmosphere. A smart Arbitrator will meet with the attorneys first to ask about any issues, usually evidentiary. But there is no reason not to alert the Arbitrator to the fact that your client is nervous or any other factors that may bear upon his or her presentation. It's going to be apparent during his/her exam. No different than what you might do during jury selection. (Applies to both sides). As I like to say to both plaintiff's and defendant's counsel who become theatrical, "It's not like you're trying to influence six (6) people who are not quite bright enough to get out of jury duty." But, of course, even the most uninterested Arbitrator doesn't want to send either attorney home with his tail between his legs, cause its never "the attorneys problem", its "the Arbitrator's issue."
5. An Arbitration is similar, in many ways, to a Summary Jury Trial, except you pay to take those same six (6) people out of the decision making process. With 7 out of 10 Summary Jury Trial verdicts coming back for the defendant, on liability or threshold, the plaintiff is probably better off with the ultimate decision being made by someone who understands liability/splits as well as case value, who is probably not going to "kick your client to the curb" just because they don't like his tattoos, hair style, religious beliefs, prior criminal record, etc. Ask yourself this question, "If I would go non jury because of any of the above client issues, why not got to a Arbitrator, especially with a high/low in place. I've had people tell me about six figure verdicts on SJT cases, even soft tissue, but never with enough coverage, or high enough parameters to get me excited about SJTs. Some attorneys do SJTs not really getting too concerned if they lose the case, decent, low, untriable cases. GR - Not a lot of defendant's verdicts in Arbitration.
6. Translators- Bring your own. (Example - Jansen)
7. Witnesses/Medical experts - Same as any other evidence. List in the Arbitrator's submission and 3101 requirements should apply. No Arbitrator really wants to take expert testimony. It flies in the face of the concept of expedited resolution and it also invites the Arbitrator to "tighten up his robe" and make rulings which limit the expert's testimony, much like he would in Court.

From a plaintiff's point of view the concept is "Impress the Arbitrator with the importance of this case by showing him that I'm willing to spend $1500 to have this doctor come in." Truthfully, my evaluation of the case will be much more dependent upon your client's testimony and the supporting medical records and of course, do you want this doctor cross examined, after you've been given the opportunity to present his report unrebutted, except for the defendant's IME report? Or possibly your client has an injury that is uncommon or unusual. Those are rare instances, but they occur. That's why God invented the Internet (Attorney's Textbook of Medicine)

From a defendant's point of view, the concept is to impress the Arbitrator with how strenuously the defendant counsel or carrier feels that the plaintiff's injury fails to reach threshold or is not causally related to the accident. Again, you have an unrebutted report, that, hopefully covers all the bases, but, by the very nature of the IMEs, they all have inherent problems. What records were reviewed, when was the exam done, is the doctor currently under investigation, etc.

Why would a carrier add to their expense the cost of a doctor's testimony and subject that doctor to cross examination?

(Example #6)

Most Arbitrators are smart enough to have gotten out of jury duty, so who are you impressing?

8. What numbers? Arbitrators are not privy to the hi/lo agreements but, if other things, such as liability splits, in a multiple defendant case, have been determined pre Arbitration, it can probably be mentioned, but it really doesn't matter. Improper to mention coverage, because it could impact on a Mediator's decision, consciously or subconsciously.

Can I smell a $25k policy? Of course, for, among other reasons, the reasons that cases go to Arbitration, i.e., a hit in the rear with limited soft tissue treatment, in conjunction with the defendant's information.

So can you suggest a number to the Arbitrator? Nothing prohibits it, defendants do it all the time, its called their "threshold" agreement. Often, cases go to Arbitration while a SJM is pending. ADR is a business decision, as an Arbitration while their SJM is pending, they can't have much faith in the Motion, so don't be surprised if there is a monetary award.

On the other hand, if a plaintiff is forced with a "threshold motion", especially if they haven't submitted their Opposition, or even if they got their doctor's affirmations, you shouldn't expect to "ring the bell" in Arbitration.

9. Don't' bother with jury verdicts unless it's an uncommon injury that the Arbitrator may never have seen, and even then this is not a trial. You

decided not to try to inflame a jury for a good reason, so don't expect an inflated verdict from an Arbitrator. Be happy if you get an award that represents what you would have settled the case for, which is usually a range, in any event.

If you have a case that has SUM, potentially, afterwards, you must get consent from SUM carrier to go to Arbitration, in writing and I strongly suggest you include the language that says that the Arbitrator's decision on liability/damage shall have no effect upon the subsequent SUM presentation, including entitled estoppel or res judicata. The ADR company's agreement is not binding upon the SUM carrier unless they sign off on it. I mention SUM because in AAA, Arbitrator knows the available coverage, so why shouldn't the Arbitrator in a non AAA SU<, or a UM case. You can get a UM or SUM carrier to agree to a private vender you might be better off. Make sure they agree that the typical AAA Rules on that issue apply.

WITNESSES/LIABILTY EXPERTS

Same issues involved.

One case in seven (7) years. Question of sequence of lights. Expert sat the intersection a few years after the accident, talked about the triggering mechanism under the pavement, timing of left turn arrows, what keeps them on, what triggers them to go off, the speed of a vehicle, and the distance it travels and whether the plaintiff's vehicle could have reached the arrow before it went off. Very informative.

Now I beep at cars that don't keep up the pace at a green arrow locations because I know that a 1.7 second lapse will trigger the "Off" switch, leaving me then for another full light sequence.

2 problems with the expert's testimony:

One, the expert never obtained the sequence of lights for the accident date to compare with what he observed.

Two, after the expert committed to his opinion, regarding the triggering of the "Off" switch, based upon the plaintiff's speed of 30 mph/45 feet per second, it came out that the plaintiff's testimony was that he was doing 45 mph/at 67.5 feet/second. Roughly, two (2) more car lengths/second. $5,000 well spent.

Arbitration Rules require disclosure of any expert witnesses to be called to testfiy and depending upon the Arbitrator failure to provide a §3101 Disclosure can also prevent that expert from testifying. Why would you put an Arbitrator in a position where he has to determine an issue of "fairness and equity" when you know that he knows the CPLR standard and you or the carrier has paid for this expert. Really expect me to bar the expert from testifying after he has been paid.

One last comment on witnesses, which may be the most important, because it does come up frequently almost always when liability is an issue. Do not presume that the other side will or will not produce their client and this really is directed at plaintiffs. You may have received a defendant's submission that included the kitchen sink, such as;

a. Police Report - Admissable
b. Supplementary Witness/Operator Statements and Diagrams - Admissable
c. Photographs - Admissable subject to some witness properly identifying but generally admissable on consent
d. GOOGLE photographs - generally require witness corroboration as to accuracy for admissibility, otherwise more traditional authentication.
e. EBT transcripts - Admissable, but not needed in their entirety. Either used at the Arbitration for direct evidence or cross-exam. Put in pages you need and highlight the Qs & As that you want considered.

NOTE: <u>EBTs for Cross-Exam</u>

The traditional format for use of an EBT transcript on a witness was designed to 1, permit a witness to be fairly confronted with a subjectively contrary statement before being required to respond, under oath, to the alleged discrepancy, or 2, to make a witness look even dumber then he is, for having changed his testimony in the hopes that six people, who wouldn't
trade places with him for all the money in the world, will totally discredit not only that answer, but will completely ignore the negative aspect of the Falsus in Uno charge, when given.

Attach the execution and Errata pages, you may need it. Preliminary for EBT use, in front of me;

1. Did you receive, read, sign and return the transcript?
2. Did you may any changes?
3. Did you tell us on direct exam that "X"?
4. Did you read/review the transcript for today's testimony?
5. Page _____, Line _____

If it involves a disputed and important issue in the case why do you need to spend time making the witness squirm. If the other attorney wants to go into it on re direct, after the witness possibly forgets his rehearsed excuse, or go back to it on re cross, and the excuse isn't palpably lame, it becomes a big issue in the case and neither side wants credibility of their client to be a focal issue.

Any witness who substantially changes testimony has got a problem, especially if it wasn't changed in an Errata sheet.

You may need the defendant or some other witness to make out a PFC. MVA - Police Report.

Example of why you shouldn't presume a witness is being produced or will fill in your PFC, specifically in pre discovery Arbitration. Check pleadings if it's in suit, otherwise make sure you can prove a PFC by your client's testimony or other independent witness.

Example

NYC Administrative Code exempts single family houses from any obligation to remove snow from a sidewalk, but once they do, they have to do so in a non negligent manner. Pleadings - Defendant denied custody, control and ownership of the sidewalk in front of her single family house. Defendant testified to living at the premises for 15 years and never touching snow on the sidewalk. Plaintiff was in no position to prove otherwise, there being no EBTs, pre-discovery.

Remember that you are still the plaintiff and you must prove a PFC evaluate what you're offering like you're trying a case. The evidentiary standards may be relaxed but you cant expect the Arbitrator or the defendant's attorney to fill in the blanks, without some evidence.

The plaintiff's attorney who handles ADR for the firm involved and who never met with the client until the day of, asked for the defendant's testimony on Summation to be discounted completely as incredible. That still wouldn't make out a PFC for the plaintiff.

SUMMATIONS

Same rules involved.

Defendant goes first, don't interrupt and you wont be interrupted, but, this is not a jury trial, HENCE,

What is the best part of your case, and why?

To the point!

I will ask you questions that should give you some indication of my gut reaction to the case, as to both sides. The case is in, I know the law and I'm within my rights to form opinions. Unlike a trial where you may want to address every issue, maybe even come up with some Plan B to sell, if you didn't sell it with the evidence, you won't sell it with summation.

Wouldn't you like to have some idea how the case is gong to turn out, so your client, isn't completely surprised. If it didn't go well you might as well lay the groundwork for what you expect the result to be. As a defendant, you probably have to do a report to the claim file. Whether you're house or outside counsel, nobody likes surprises, not plaintiffs, not insurance companies.

I don't care if the plaintiff's attorney blames the Arbitrator in speaking to his client, I get that. But if defendant's attorney blames the Arbitrator, or more precisely uses the Arbitrator in a "scapegoat" he can ruin an Arbitrator's career.

I'm not complaining, but this can be a tricky business and its not an easy job. Requires cooperation and an understanding of what everyone is trying to accomplish, which hopefully, is to get cases settled.

Mediators/Arbitrators - Case resolved, no one hurt, everyone wants to be a hero, but being one is not over rated but certainly underappreciated.

Plaintiff's attorney - Satisfied client. You made money and will get free advertising.

Defendant's attorney - Makes the carrier happy by saving them money. There are plenty of cases that need to be tried for many reasons, whether you'll eve get a trial on most of them is a very practical problem that calls for a practical solution, which may very well be ADR.

JOSEPH C. TONETTI
548 West Jericho Turnpike
Smithtown, New York 11724
(631) 724-4233

EDUCATIONAL BACKGROUND:

Graduate of New York School of Law,
New York City, New York
Juris Doctor, 1978.

Graduate of Rutgers College,
Rutgers University
New Brunswick, New Jersey
Bachelor of Arts, 1972.

EMPLOYMENT BACKGROUND:

2010- present:

JOSEPH C. TONETTI, P.C.
548 W. Jericho Turnpike
Smithtown, New York 11787
- All aspects of personal injury litigation on behalf of insurance carriers, as well as claimants, as well as a neutral for various ADR companies.

2006 - 2009:

TONETTI & AMBROSINO, Esqs.
548 West Jericho Turnpike
Smithtown, New York 11787
- All aspects of personal injury litigation on behalf of insurance carriers, as well as claimants

1983-2006:

HOBBES & TONETTI, Esqs.
739 East Main Street
Riverhead, New York 11901
- Representing various insurance carriers and their insureds

1981-1983

CORDES & TONETTI, Esqs.
38 Kings Highway
Hauppauge, New York 11788.

	Representing various insurance carriers and their insureds
1980-1981	Associate with the firm of CORDES, PURCELL, FRITZ & INGRAO, P.C. 6277 Jericho Turnpike Commack, New York 11725 - Handling primarily negligence litigation, both plaintiff and defense, along with general practice.
1978-1980	Staff attorney for Legal Aid Society of Suffolk County, Criminal Division, Veterans Highway, Hauppauge, N.Y. 11788 John P. Middlemiss, Managing Attorney. - Criminal defense
PROFESSIONAL ASSOCIATIONS:	New York State Bar Association Suffolk County Bar Association NYS Trial Lawyers Association