VISIT US ONLINE WWW.SFTLA.ORG

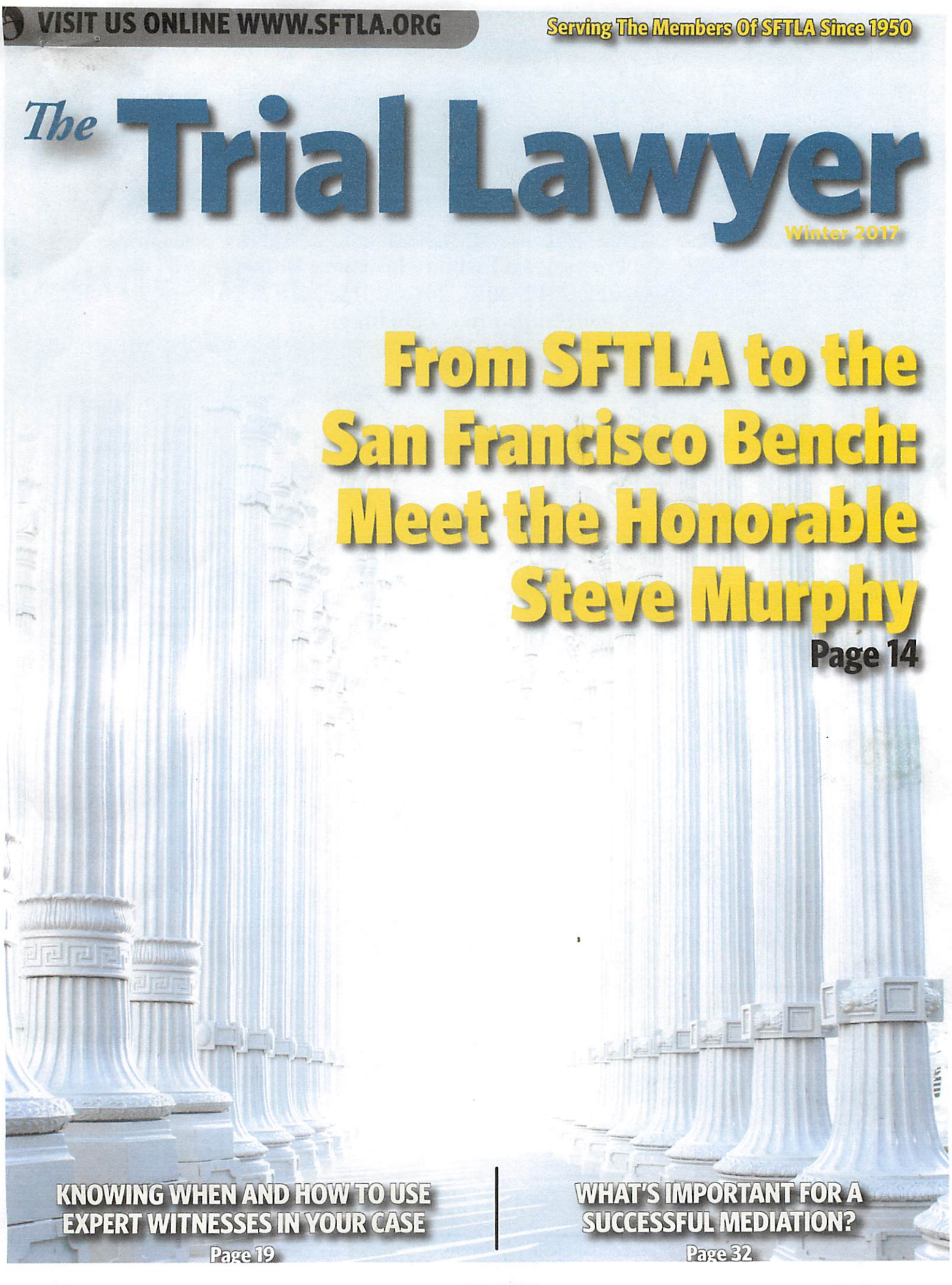
Serving The Members Of SFTLA Since 1950

The Trial Lawyer

Winter 2017

From SFTLA to the San Francisco Bench: Meet the Honorable Steve Murphy

Page 14



KNOWING WHEN AND HOW TO USE EXPERT WITNESSES IN YOUR CASE

Page 19

WHAT'S IMPORTANT FOR A SUCCESSFUL MEDIATION?

Page 32

What's Important For A Successful Mediation?

by Joel P. Franciosa

Almost all of us have participated in mediations, either as mediators or litigants. In determining what's important for a successful mediation, I asked several experienced attorneys to share their answers to the questions below.

- **What questions do mediators address before a mediation can be scheduled in order to be a successful one ?**
- **What does a plaintiff attorney do to get ready for a mediation? What do mediators do to get ready for a mediation?**
- **What devices do mediators use to help everyone cross the finish line?**
- **How can that information help litigators and their clients get ready to prepare for a successful mediation?**

Here are specific responses from two successful mediators and a veteran plaintiff's attorney. After reviewing the answers, it appears there are some issues and strategies that are universal for a successful mediation.

1. The case should be "ripe" for a mediation.

Mike Ornstil, mediator at JAMS: "When I am hired to mediate a case, it is most important to me that the case is ready to mediate from the parties' perspective and there is a true desire to make a strong effort to settle. We hear too often after a mediation that gets nowhere of one or more parties that the other side wasn't ready to mediate, or was not serious about settling, or was using the mediation process other than to explore settlement. What is most important is that the case is ripe to settle and the parties come prepared to listen to the other side and to me, and prepared to be flexible and make some hard decisions".

Chis Lavdiotis, an independent mediator: "I conduct a pre-mediation conference call with all counsel, together, one week prior to the mediation. The purpose is the find out what the case is about; *ensure that all decision-makers will be present;* determine whether the parties are ready to negotiate; and determine whether each side has all the information it needs from the other, or is waiting on information (e.g. responses to discovery, billings, lien information, documents). We also discuss liens and whether they are potential barriers to settlement; whether the lien holders been contacted and will be available by phone during the mediation session; whether there have been any negotiations; if there is a trial date; and whether there are any dynamics which the mediator should be aware of before we sit down".

2. Have decision-makers present who are willing to listen and work toward a settlement.

Chuck Geerhart, plaintiff's lawyer, partner at Paoli & Geerhart: When I get a joint call from the mediator, here is what I want to accomplish: "Clear away any issues that won't be an issue at mediation, e.g., liability, causation, amount of medical specials. Make sure someone with real monetary authority will attend for the defense. Encourage a pre-mediation offer by the defense."

3. How to close the gap between an initial demand and offer that are far apart

Chris Lavdiotis: "About 90 – 95% of the time parties start out very far apart – at opposite ends of the negotiating spectrum. So we discuss this right off the bat: expect a demand you won't like and an offer by which you may be insulted. Talk about it straight up and prepare to deal with it. Neither side should take that personally. Remember, that this is part of negotiations and that can be time-consuming, difficult, and frustrating, even for the mediator. Prepare to stay on task and keep working."

Chuck Geerhart: "Since there has never been carrier that did not want to negotiate down from my demand, I always make my demands "high but plausible". I leave room for negotiation. My demand is usually the same as what I put in the mediation brief. If the defense will commit to making a substantial offer if we reduce the demand, I may make a unilateral reduction. I am more likely to do that if my client is ultra-eager to settle or if, on reflection, I feel the demand was too high".

Mike Ornstil: "This is the situation in many, many of my mediations. When this occurs, and parties get upset or concerned, I simply tell them not to worry or make any assumptions as to

Continues on page 30 »

Joel P. Franciosa has been a full time mediator for 8+ years and handles all types of personal injury cases, as well as contract, business and ADA cases. Prior to that, he was a litigator for 16+ years. He enjoys helping parties reach a mutually acceptable resolution of their disputes"
He can be reached at by phone:(510) 272-5103,
E-Mail: joel@jpfmediation, or hrough his website: jpfmediation.com

» Closing Arguments continues from page 32

where the other side may be headed. I tell them that in my experience, over 22 years of negotiation, where a party starts has very little relation to where they might end. I tell them that starting numbers are just that – a place to start. I tell them it is much more important where a party ends than where it starts. I tell them that opening numbers are just that – a place to start. I tell them that opening numbers and early numbers, and early numbers in negotiation, are somewhat "artificial" in the sense that there is no expectation by either side that the other side will be remotely interested in settling at these numbers. Lastly, I tell the parties that in negotiations it is the destination, not the journey, that counts. I tell them we may have a long, drawn out painful negotiation – that is the journey –but if we get to a settlement, then the journey was well worth it."

4. How does everyone deal with exploring value?

Mike Ornstil: "Asking the parties to run through *a thorough case evaluation and risk assessment* using different potential results on liability and damages is helpful. I will also role play and assume the role of the opposing counsel or key witness so that the parties can get a preview of what a witness may testify to, or what opposing counsel's closing argument may sound like. I will ask counsel whether they want to throw out a bracket when negotiations get bogged down, or if asked, I am always willing to make a mediator's proposal. In the end, the most important thing is to be patient and persistent. There are times during a mediation that settlement looks hopeless, yet there are have been many times that such cases have settled by keeping the discussions and negotiations going. As long as the parties are talking and exchanging numbers, there is hope. The worst thing a mediator can do to reveal confidential information. I think the second worst thing a mediator can do is to give up too easily."

"This [exploring value] is one of the most important things we do as mediators. I spend a fair amount of time picking apart a case to help the parties get a sense as to the range of potential jury verdicts. This entails asking counsel tough questions and asking counsel to answer these questions as candidly as comfort allows. I will ask each side about the liability aspect of the case. How often will a jury find liability? Is there comparative fault? What is the range of comparative fault findings? Shifting to damages, I will ask similar questions about a good day, bad day, most likely in terms of economic and non-economic damages. This helps the parties get of all the potential outcomes at trial and provides a picture of each side's upside and downside risk if they do not settle. I use our whiteboards when going through this analysis so the numbers are on the board for reference and reflection. I am not afraid to offer my opinions on all the questions I ask counsel, but usually hold off offering my opinions unless asked. And if asked, I provide my candid opinions and explain my opinions."

Chris Lavdiotis: "Keep the parties working even as the negotiations crawl and the parties remain far apart; share my thoughts about the issues in dispute; how the jury may view each side's slant on the issue and potential value. Be both facilitative and evaluative; keep everyone talking; make sure everyone is relaxed and not anxious. Find a connection with each decision-maker, whatever that might be. Kids? Dogs? Sports teams? A movie? A restaurant? Where we grew up? It can be anything."

"Understand any cultural dynamics that may be playing a role in negotiations, including possible biases; respect any cultural differences or dynamics that may be involved. Respect everyone and where they are coming from."

Chuck Geerhart: "I respond to their moves. If the defense makes good solid moves, I make good solid reductions. If the defense is moving in very small increments (I've never understood why they insist on doing this), I will do the same. I don't enter a mediation with a "bottom line". But sometimes the bottom line becomes apparent to both sides through negotiation".

5. How does a mediator help reach a settlement?

Chuck Geerhart: "While I don't believe a mediator has an obligation to maximize settlement value for a plaintiff, I do expect the mediator to help insure defense offers to pass the "giggle test". If I have a clear liability case with a surgery and $75,000 in hard medical specials and wage loss, how can the opening offer be $60,000? I want the mediator to be pushing the defense to make good solid moves and then I will do the same. When an apparent impasse is reached, that is when the mediator need to get creative and use all the tools in his or her kit to promote movement. Although I prefer a facilitative style, later in the day the mediator may have to become evaluative and let the parties know where he or she sees weaknesses in the plaintiff or defense case."

Chris Lavdiotis: " Tell the parties right at the start that, if a party starts thinking that a case is not going to settle today, then they should listen and trust the mediator, especially when the mediator suggests to keep working. Tell both sides that the mediator is the only one who is talking to, and getting information from each room and side. If the mediator feels the parties should keep working, then they should strongly consider to keep working.

5. Mediators must bring their "A" game

Finally, according to those interviewed, the mediator must "bring it" every day. The mediator cannot have a bad day. He or she must bring energy, enthusiasm, and "positive vibes" to every mediation and remain consistent in sending that positivity – or the case will not resolve.

End Notes

1 The "Ultimate Question" is the inference you're trying to elicit from your questions. Don't ask the witness to agree with the inference because the witness probably won't.