THE PREMEDIATION CONFERENCE: AN UNDERUSED STEP TOWARDS RESOLUTION

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NATURE OF THE DISPUTE

The mediator's understanding of your client's position on factual and legal issues should not begin with the submission of your mediation statement and exhibits. After the parties have agreed, either voluntarily or as a result of judicial persuasion, to submit their dispute to mediation, and you and opposing counsel have agreed on a particular mediator, the first contact with the mediator is often by your legal assistant to determine the mediator's availability. A mediator typically requests information concerning the nature of the dispute and the identities of the parties and their attorneys for purposes of a conflict check. An alternative that you should consider is that you, rather than your legal assistant, contact the mediator to discuss not only his or her availability and possible conflicts, but to generally discuss the case based upon your characterization of the parties' respective claims and legal and factual issues. Mediators usually ask a multitude of questions about various aspects of the case to which you, in the absence of opposing counsel, may fashion a response favorable to your client. If the mediator does not suggest a premediation conference, you should do so.

Generally, the first topic discussed is an overview of the dispute. Such is the case in every conference, whether the claim involves personal injury, employment, business, collection, professional negligence, etc. The most effective mediators seek to be as well informed about the parties' claims and defenses as the parties themselves. Although the discussion of the nature of the dispute rarely takes more than five or ten minutes, these minutes are critical for laying the groundwork for the mediation. At some point in the mediation, most mediators become evaluative. Their initial impression of the strengths or weaknesses of the respective parties' claims starts with the premediation conference.

Mediators often request copies of key pleadings such as complaint, answer, demurrer, motion for summary judgment, and case management statements.

DECISION MAKERS

It is important for you, as well as the mediator, to determine who needs to attend the mediation so that a binding resolution can be reached. In the case of an insured defendant, telephone standby is not a substitute for personal participation by the insurance representative. In court-connected mediations, written permission from the judge to whom the matter is assigned is often required before an insurance representative is excused from personal attendance. More importantly, the representative who is handling the claim should attend. Too often, at the start of the mediation, the representative states that he or she has just picked up the file or is filling in for the person to which the claim is assigned.

With corporate parties, a person with real settlement authority should attend. A resolution that is subject to the board or chief executive officer approval is no resolution at all. Where husband and wife are parties, both must attend the mediation. Even if one spouse has a power of attorney or represents that he or she is authorized to enter into a binding settlement, typically that spouse is unwilling to commit to a settlement without first contacting the non-attending spouse for approval of any proposed resolution. Mediation is a participatory interactive process. The failure of all decision makers to attend the session creates a serious obstacle to resolution, and the possibility of such an outcome may well be a legitimate reason to decline to go forward with the mediation. If the matter is a courtconnected mediation, the court's assistance may be needed to ensure the attendance of all decision makers. In other matters, a premediation conference may be an ideal was to resolve this dilemma.

EXCHANGE OF INFORMATION

To evaluate liability and damages, relevant documents must be exchanged in advance of the mediation. This is particularly so for defendants where documents related to damages are almost always solely in plaintiff's possession. A premediation conference can avoid the situation where the mediation must be continued because of the absence of relevant documents. At the premediation conference, you can enlist the mediator's help in ensuring that needed documents will be provided in advance of the mediation.

THE NEED FOR A JOINT SESSION

If you believe it is unwise to have all parties participate in the initial joint session, you should raise this issue at the premediation conference. Most mediators believe that joint sessions should be held to allow the mediator to provide the parties, as opposed to their attorneys, with information concerning the mediator's background, particularly his or her experience involving the claims asserted; an explanation of the mediation process, including its voluntariness and mediation confidentiality; and to permit counsel to address the opposing party or insurance representative without that party's attorney acting as a filter. If you represent plaintiffs, the mediation is usually the first opportunity for the insurance representative to evaluate your client's demeanor and witness potential.

Where a party feels strongly that the joint session should be avoided, because the case involves a sexual assault case, or where there is a possibility that the parties might come to blows, the mediator almost certainly will forego a joint session and proceed directly to private caucus. Other matters that may impact the joint session include cultural issues, handicapped or disabled parties, and attendance of experts and nonparties, such as a party's "trusted adviser."

SETTLEMENT DISCUSSIONS

Most mediators use the last demand and the last offer as the starting point for settlement negotiations. If there are changed circumstances or if the demand/offer was prelitigation or prediscovery, then the premediation conference is the appropriate time to advise the mediator that the starting point of negotiations will not be the last demand/last offer.

EXCHANGE OF MEDIATION STATEMENTS

If you suspect that opposing counsel may serve a “for your eyes only” statement on the mediator or if you wish to do so, this is a matter that should be discussed at the premediation conference. Most mediators require that the parties exchange mediation statements, adding that if there is some evidence that a party wishes to disclose to the mediator only, then such disclosure should be made by a separate statement. As an advocate, I believe it is important that plaintiff’s counsel provide opposing counsel with a complete statement of his or her client’s position as to liability and damages. The same is true for defense counsel.

SELF REPRESENTED LITIGANTS

Where a party is not represented by counsel, the mediation is most often court-connected. At the first case management conference, the judge has urged the parties to agree to mediation. Before agreeing to a particular mediator, the self-represented litigant (“SRL”) will often contact the mediator to inquire about his or her background and invariably to talk about the case. This first contact provides the mediator with the opportunity to explain the mediation process, about which the SRL is almost always ignorant. One key topic is to make it clear to the SRL that the mediator does not have the power to decide any disputed matter.

When I am representing a party, I encourage contact between the mediator and the SRL prior to the premediation conference. In my experience, without some advance understanding of the purpose mediation, SRLs are reluctant to engage in open and productive discussions in the presence of opposing counsel. I view the initial ex parte communication between the mediator and the SRL as a positive step towards resolution.

It is important for a mediator to gain an SRL's confidence because, invariably at some point in the mediation, the SRL will ask the mediator if the settlement offer should be accepted. While the mediator's response may be, at best, equivocal, it usually gives the SRL some indication whether acceptance is reasonable under the circumstances.

In summary, reduced court funding has had a dramatic effect on trial courts. In Contra Costa County, for example, a trial day is three hours. The time from first case management conference to first trial date is approximately two years. Because mediation, whether private or court-connected, is the most frequently used process to attempt resolution, the premediation conference plays an important role in achieving such resolution.

* As a neutral, 40 percent of the time spent in mediation of real estate transactions, construction defect disputes and personal injuries, 40 percent in arbitration of commercial, construction and personal injury disputes, and 20 percent as a hearing officer deciding applications of disability retirement of public employees. As an attorney, 25 percent of time spent in construction litigation and 25 percent in real property litigation, 25 percent in business litigation and 25 percent with transactional matters. Prior experience includes 36 years in construction, real property, personal injury, commercial, professional negligence litigation, fire loss claims and insurance coverage disputes. Lecturer for Hastings College of Law, Golden Gate University, California Continuing Education of the Bar, San Francisco Trial Lawyers Association and California Trial Lawyers Association.