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PERSPECTIVE

Mediation preparation and negotiating strategies

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Mediations, like trials, involve legal, tactical and ethical considerations and require diligent preparation. The following is a chronological list of the steps that should be taken in the preparation phase and the several strategies available during negotiations.

Talk to the client about the purpose of mediation, including its benefits and negatives. American Bar Association, Section of Litigation, Ethical Guideline for Settlement Negotiations 3.1.1 provides that "A lawyer should consider and discuss with the client, promptly after retention in a dispute … possible alternatives to conventional litigation, including settlement." Clients should be told about the risks of litigation, mediation costs and the financial advantages and disadvantages of settling or going to trial, including remaining pre-trial motions that still must be heard and the substantial benefit of mediation confidentiality.

Decide when the mediation should be conducted. An early mediation date, when discovery is in its preliminary stages, benefits the party that is more knowledgeable about the facts and, if successful, saves both parties from mounting legal fees and costs. A mediation calendared shortly before a dispositive motion is heard can be effective because opposing counsel may not want to risk settlement opportunities if the motion is legally sound and factually supported. On the other hand, if the motion is denied, the opposing party may be emboldened. A mediation shortly before trial can be effective because of uncertainty of what a jury or court might decide and the concern of additional fees and costs, especially if there is a prevailing party attorney's fee clause or statute.

Choose the mediator. The mediator should be knowledgeable about the process and the applicable law. Also, do the parties need a neutral who is evaluative or "holds the parties' hands" or can utilize both approaches? It is also beneficial to work with a person whom the lawyer has worked with previously.

Discuss the case with the mediator beforehand. A pre-mediation conference may be helpful if there is a need to advise the mediator about the non-attendance of a party (see Rule of Court 3.874) or to learn whether the mediator has particular requirements regarding briefs and exhibits.

Be familiar with applicable legal principles. Review both the CACI civil jury instructions for the elements of the applicable causes of action and defenses and the leading legal texts for additional relevant law.

Analyze the factual and legal strengths and weaknesses of both your case and the opposing party's. Be ready to discuss with the mediator the strengths and weaknesses of your case. As an example, is there a problem proving or disproving damages or is one of your witnesses arguably not credible? An effective method of anticipating this discussion is to write out the elements of every cause of action and then, in the adjoining grids, insert all of the admissible evidence (testimonial and exhibits) in support of or contrary to those elements. Be prepared to defend any cause of action or defense that lacks evidentiary support or uses evidence that is arguably inadmissible (such as certain types of hearsay).

Provide an interesting and timely mediation brief. "Sell" your case in the brief and impress the mediator with your grasp of the facts and law. Do not rehash obvious legal principles. Summarize the legal theories and discuss only those issues that are in conflict or are novel. Provide the status of upcoming, significant procedural events, such as pending dispositive motions or contested discovery, and the status of settlement negotiations. Include exhibits that truly clarify or explain a factual contention. Do not include unnecessary reams of paper such as voluminous medical bills, which do not explain or clarify what can be easily summarized in the brief.

Decide whether or not to reveal an undiscovered "smoking gun." There are no clear answers whether evidence, that could impact the matter at trial or arbitration, should be revealed at mediation. The following questions apply to that discussion: Will the information persuade the trial court, jury or arbitrator or is its value exaggerated? Since such an evaluation is often subjective, ask third parties (including the mediator) for their opinions about the impact of the unrevealed fact or issue. Will the information be revealed ultimately in discovery? Is the evidence potentially inadmissible and, therefore, could never be used? Is the financial cost of developing the smoking gun at trial prohibitive? This question is most appropriate if the issue involves expert witnesses and the tests that must be conducted to establish their opinions? Will the matter most likely not be tried because of client reluctance, financial considerations or that the matter most likely cannot be successfully prosecuted or defended?

Send the brief to the mediator several days before the mediation. Briefs filed the day before a mediation will be read but will not have the same impact as those sent ahead of time. Besides, a late brief is more likely to be disorganized and to omit essential facts, law or argument.

Exchange mediation briefs with opposing counsel. Most attorneys do not send their briefs to opposing counsel, which means that mediators, with the consent of the parties, must spend valuable time educating both parties about known facts, laws and contentions. Submitting a confidential brief, when a complaint has not been filed, makes sense. Otherwise, after a complaint has been filed, the known facts and contentions should be divulged in a non-confidential memorandum to opposing counsel. Facts, legal theories or arguments that are best held in reserve, should be put in a separate, confidential brief for the mediator's eyes only. At the end of the day, experience has shown that there are few issues a party should keep confidential throughout a mediation.

Prepare clients for mediation. Whether the mediation is remote or in person, advise clients before the mediation regarding its purpose – including confidentiality, what you hope to achieve, the neutral's role, how to dress, and how to act when the mediator is present. Discuss whether the client should take an active part in the mediation and, if so, what questions the mediator may ask him or her. Determine if the client needs a support person to be present, especially if the underlying facts are traumatic or the client is youthful or inexperienced.

Discuss mediation goals and opening demands or offers with the client. This conversation may include how far the clients are prepared to move; more likely, that aspect of the discussion should be reserved for the mediation itself because the dynamic nature of the process often impacts expectations. Concurrently, consider, if known, the opposing party's negotiating tactics or strategy. Consider, as well, if relevant, the opposing party's financial condition or insurance status.

Determine whether any witnesses, other than the client, should attend the mediation. Is there a credible witness who can corroborate the client's version of the facts when the client's credibility is under attack? Alternatively, consider using a declaration when the corroborating witness is not available.

Use demonstrative evidence and other illustrative aids. Rely, as you would at trial, on physical evidence and illustrative aids to emphasize key topics. Such exhibits can clarify or enhance the testimony of witnesses, make abstract concepts real and make a case look stronger than it might really be. Provide, as an example, a chronology to clarify confusing events. Consider using applicable correspondence, contracts, charts, pictures or a PowerPoint presentation of those same items.

Submit the names of your attending parties and witnesses. California Rule of Court 3.874, subd. (a) (1) and (2) requires the personal attendance of the parties, their counsels and insurance representatives at all mediation sessions, unless excused. Subd. (b) (1) requires the parties at least five court days before the first mediation session to serve a list of their mediation participants.

Have essential documents available at the mediation. Have immediately accessible the pleadings, relevant correspondence, discovery and exhibits, since it is often necessary, when discussing the case with the mediator, to refer to a complaint or answer, deposition transcript, and interrogatory responses to support or contradict an important issue.

Assess opposing counsel and his or her client. Before the mediation, develop a good idea about the strengths and weaknesses of the opposing party's case. Is counsel experienced, knowledgeable and prepared or flying by the seat of his or her pants? Such information is helpful in putting a value on the case and assessing the risks of going to trial.

Evaluate the benefits of making the first demand or offer. Typically, the plaintiff initiates the negotiating phase of mediation with a demand. Going first allows a party to set the table for ensuing negotiations. Going second has the advantage of evaluating the initial move. Who goes first or second should not be set in stone; as in football, which team kicks off or receives, should reflect the relative strengths and weaknesses of the parties on that day and whether beginning with an opening offer or demand is a tactical advantage. Discuss with the mediator which party should commence the negotiation phase.

Evaluate the opposing party's known financial condition or insurance status. It is unproductive for a plaintiff to make a demand in the insulting zone if the defendant does not have the financial resources to respond with a reasonable amount, especially if bankruptcy or insolvency is a foreseeable option. In such circumstances, it may be more productive for the plaintiff to keep the first demand in a reasonable zone which should attract a reasonable response.

When is the trial or arbitration date? A mediation that takes place well before trial or arbitration may result in a lower settlement because all of the uncertainties are not known and less has been expended on legal fees and related costs. In contrast, an imminent trial may result in a larger settlement because the costs are greater. The opening demands and offers in both situations should reflect these contingencies.

The second stage of a mediation is the introductory phase in which the mediator talks to the parties separately about that day's process, including confidentiality, and that he or she will only discuss the contents of confidential briefs with opposing counsel's consent. The introductory stage morphs into a fact gathering process where, generally, the mediator asks about and comments on the facts and applicable law. The depth and extent of this latter stage depends on both the complexity of the instant facts and law and whether the mediation is a half or full day. In the mediator's judgment, he or she moves the discussion to **the negotiation stage** where "demands" and "offers" are exchanged.

Ordinarily, negotiations begin with the exchange of solid numbers and terms. This is known as distributive or marketplace bargaining. This type of negotiation continues as long as there is progress. **If, after a couple of moves, the parties are making only small or inconsequential demands and offers, the mediator may encourage the use of brackets or ranges.** Brackets, or the use of two contrasting numbers (for example a plaintiff states that it will demand $500,000 if the defendant offers $200,000), enables the parties to make bigger moves without compromising their credibility because brackets are conditional. In this example, the responding party can accept the range, propose its own bracket (for example, it will pay $50,000 if the demand is $150,0000), respond with a single number or not respond at all because the opposing party's numbers are arguably unreasonable.

Brackets, through their midpoints, send a message about the parties' goals. In the above example, the plaintiff is supposedly signaling that it wants to settle for approximately $350,000 and the defendant for $100,000. Besides the midpoints, the benefits of brackets is they move the par-

ties closer together but, rarely by themselves, do they lead to a settlement. After a couple of bracket moves, when the numbers become more reasonable, the parties may return to distributive or marketplace bargaining.

At some point in the mediation, after the parties have been involved in both marketplace bargaining and brackets, one or both parties may be disinclined to make any further meaningful or significant moves. When that occurs, the mediator should attempt to find out, with an absolute promise of confidentiality what a party is attempting to achieve. If it's an "authority" issue and cannot be resolved immediately by a telephone call, the mediator should make a proposal, which is kept "open" so that the party with the authority problem has an opportunity to resolve it.

Alternatively, "wouldya-couldya" is another option when an impasse occurs. The mediator, after lengthy but unsuccessful negotiations, asks one of the parties what amount or term it is seeking. (This discussion is undertaken with a promise of absolute confidentiality.) If the answer is reasonable or seemingly achievable, the mediator, at an appropriate moment, and without any telegraphing of the source, discusses that amount or term with opposing counsel – and, again, with absolute confidentiality. In effect, he or she asks, "If I can settle this case for X (the amount suggested by the opposing party), should I try?" The subject is dropped if it does not produce a favorable response. However, if there is some acceptance or approval between the two parties, the mediator will attempt to narrow the divide until unanimity (and a settlement) is achieved.

A mediator's proposal, however, is more common when an impasse has occurred. With the approval of all parties, the mediator proposes a settlement in writing that he or she hopes, based on the prior discussions, will be acceptable to everyone. At this point in the process, a reasoned proposal has a substantial chance of being accepted because the settlement is being suggested by the mediator, a neutral third party, and the mediator, after much discussion, should be seen by all concerned as informed, knowledgeable, fair and credible.

Generally, a proposal has two approaches: it either reflects the mediator's educated guess as to terms that will be acceptable to everyone or, alternatively, is the mediator's evaluation of what the case is "worth." Because of the potential disparity between the two types of proposals, mediators may advise the parties which approach they have used. Depending on the wishes of the parties, the proposal can be kept "open" for a short period of time or for several days.

If one party accepts the proposal and the other rejects it, the mediator should not tell the rejecting party that opposing counsel accepted it because that would give the rejecting party an unfair advantage in future negotiations. The accepting party knows that the other party rejected the proposal and, to obtain a settlement, will probably have to change its settlement position. The mediator should ask the accepting party how much more it can "move" and, as for the rejecting party, attempt to learn why it rejected the proposal. In either instance, the mediator should find out how far apart the parties are and continue, either in-person, by email, or on the telephone, to discuss settlement prospects with them.

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