The Value Of Pre-Litigation Mediation:

What Every California Lawer Should Know

By Jan Frankel Schau

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In its infancy, mediation was not well understood. While some attorneys viewed it as a sign of weakness to recommend an early mediation, others shied away from it because they believed that mediation would allow for "free discovery" of the most pressing evidence in the case. As the process matured, that concept largely

disappeared and today most attorneys agree to mediate because they are truly interested in achieving a settlement. And, indeed, while the great majority of mediations result in a resolution of the dispute, the settlement often occurs after the parties have spent a lot of money on discovery, motion practice, and other litigation costs. Until there is significant formal discovery and until the key legal claims have been tested through motion practice in court, many attorneys believe that the true settlement value of their case can't be determined.

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This article argues that conducting a mediation before the suit is even filed is a very good idea. Yes, a mediation that occurs so early in the game may give the parties a "free look" at their adversaries' cases if there is no settlement. But it also could result in a settlement that avoids the cost, time, and aggravation that comes with preparing for and conducting a trial. Furthermore, even if the dispute does not settle at an early mediation, the parties may spend less time and money in the course of litigation because of the insight gained from the early mediation.

Consider the following scenario: Four young women complain to an employment lawyer about being terminated from their job at a health clinic within weeks of a heated meeting between staff and the new CEO regarding policy changes that included potential violations of patient's rights to privacy, billing discrepancies, and paying kickbacks to pharmaceutical companies and then overcharging patients for discounted pharmaceuticals. The lawyer decides to take the case and sends notice to the clinic with a demand for payment of damages of $100,000 each, together with a draft complaint to be filed within 30 days. After the clinic's lawyer tells the chairman of the board what it will cost to defend the case, even if the clinic wins at trial, the chairman agrees that an attempt at early resolution through mediation should occur before litigation is filed, in the hope that the costs of litigation, the potential disruption to the business, and the publicity of an unwanted lawsuit could be avoided.

Should the plaintiffs' lawyer accept the defendant's offer to mediate at this early stage? Here are ten reasons for considering pre-litigation mediation.

— Reason 1 —

By engaging in early mediation, the parties will quickly learn what discovery is needed to prove or defend the case if it doesn't settle. They may learn, through briefs and arguments throughout the day, what evidence their adversaries are relying on to substantiate their claims or defenses. If there are witness statements, for example, there will be a clear discovery outline by the end of the day if the matter doesn't resolve.

— Reason 2 —

In addition to an outline of the documents and witnesses each party will need, they will have gained valuable insight into their opponents' theories and the legal defenses. Is there a case on point that they think will support summary judgment? Is the defendant claiming that the plaintiffs had performance issues that justified termination? Do the plaintiffs have evidence of a statement by the CEO expressing a bias against women?

— Reason 3 —

The parties will be able to take advantage of an experienced neutral who, if asked, can offer an early evaluation of the strengths and weaknesses of the case as well as a reasonable range of its value. If the neutral concludes after several hours with the parties that two of the plaintiffs will likely lose or win only minimal damages, and the other two may, indeed, have cases with a value of $50-$100,000, that may inform the approach to settlement or to litigation for both sides.

— Reason 4 —

Lawyers are sometimes blinded by "advocacy bias," falling in love with the facts and their case theories. A lawyer may genuinely sympathize with the client, making it a challenge to see the other side's perspectives. This phenomenon may be more prevalent in cases where the lawyer has a stake in the

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outcome, such as a contingency fee or a sliding scale fee based on success in the ultimate outcome. Before the lawyer advances significant costs, mediation can be a useful window into the likely expected return on investment.

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A mediator can help to clear the fog and highlight weaknesses in a case, allowing counsel to better gauge the chances of prevailing. This may include a frank, but confidential assessment of the credibility of the clients and any witnesses present at the mediation. If, for example, a client comes across as genuine, articulate, and likeable, the neutral will be able to convey that to opposing counsel, even in the absence of a joint session. If, however, the client is difficult to like or believe, the neutral may point that out privately, so that the attorney can assess whether these challenges can be overcome in the course of litigation or not.

— Reason 5 —

Preparing for a pre-litigation mediation challenges both sides to adjust the timing in their handling of the dispute. Ordinarily, the evaluation of the case is a gradual process, developing over months or years. But with pre-litigation mediation, an attorney must immediately evaluate both the strengths and weaknesses of the case and the valuation of damages before and during a mediation that takes place before any formal discovery and often before even a completed and thorough internal investigation. In our hypothetical, assume that the plaintiffs' lawyer has done that, and has set a reserve point at a collective $200,000. The matter does not settle at the mediation, but the defendant's last offer is $150,000 (i.e., $50,000 for two of the four Plaintiffs and $25,000 for each of the other two). That information might cause the plaintiffs' lawyer to consider whether it is worth pursuing the two cases with smaller damages, or worth settling those two and continuing to litigate the others.

On the flip side, the information gained by the defendant in this hypothetical might lead it to conclude that the parties are a mere $50,000 away from settling four cases, and it might persuade counsel to ask for more settlement authority rather than spend an amount close to the "final" demand for settlement for costs and fees to litigate the four cases while still subjecting the client to the risk of loss.

— Reason 6 —

If pre-litigation mediation fails, counsel may at least have developed a rapport with each other. Both sides will have made a good faith effort to resolve the case without any scorched earth tactics. At the same time, each side will have had an opportunity to fully discuss and evaluate the evidence that they already have and the evidence that they will need in order to re-evaluate (or win) the case later. That discussion will likely be chiefly with their own clients throughout the mediation, but a good mediator will always bring the lawyers together in the event that the case does not conclude in order to set out some discovery tasks that may help to bring the parties together on whatever issues are still in hot dispute.

— Reason 7 —

The State Bar Rules of Civility require that an attorney discuss with both clients and opposing counsel the possibility of mediation or settlement. Section 13 of the Rules, adopted in April 2007, but not codified by statute, states: "An attorney should raise and explore with the client, and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every case as soon as possible and, when appropriate, during the course of litigation." The examples given in Section 13 include a discussion of ADR "at the outset of the relationship" and further suggests that an attorney should consider whether ADR would "adequately serve a client's interest and dispose of the controversy expeditiously and economically." Whether or not it is legally required, it is, in fact, the civil way to approach legal conflict according to our State Bar.

— Reason 8 —

Clients usually don't want to take the risk or spend the time and money it will take to win their case at trial. Mediation can usually be scheduled within 30-60 days of the initial conversation suggesting ADR as a means to resolve the dispute. Within that 30-60 days, each side can spend several hours exchanging or at least gathering the critical evidence needed to assess the case. Each side will also spend several hours meeting with their clients, preparing a mediation brief and, of course, spend a day with a mediator and their client in an effort to resolve the case. If mediation is not pursued, during the same 30-60 days, the alternative would be to file the lawsuit, spend several hours preparing an answer to the lawsuit, and conduct some preliminary discovery by way of a set of form interrogatories, requests to produce documents and perhaps the depositions of the plaintiffs.

In our hypothetical, this means that within that same period of time (the first 60 days of a claim), the defendant's attorney would have filed four answers to the four different complaints, taken four depositions, sent over four personnel files, (which the lawyer would have thoroughly reviewed) and probably propounded an initial set of discovery as well as appeared for an initial status conference in court. During that same period, the plaintiffs' attorney would have had to prepare the four clients for depositions, review their personnel files, answer form interrogatories and perhaps propound initial discovery. Generally, after the first exchanges of discovery, neither party is in a better position to truly evaluate the case than they would be without that preliminary discov-

ery. Meanwhile, the clients on both sides may often become impatient at both the delays and expenses that begin to take a toll during litigation. This really does color their attitudes towards settlement once one is well into the litigation, the case is at issue and the sunk costs of litigation have been invested by each side.

While mediation may cost $5,000-$10,000 a day (typically split 50/50), litigation during the same period is likely to cost more than double that—and an attorney will not be in a much better position to read the road map that will be necessary to follow to achieve a better outcome for the client later on.

— Reason 9 —

If the parties are worlds apart in their damages evaluation, they will feel entirely justified in litigating the case with zealous advocacy. In the hypothetical, for example, if it becomes clear that plaintiffs' bottom line is $200,000 for the four cases and defendant, although it has the financial means to withstand such a judgment, will not pay more than a collective $40,000 (nuisance value only for each claim), both sides will be completely justified spending the necessary funds to prove their case. They may not likely revisit mediation until after a summary Judgment motion has been filed, heard, or defeated, or a trial date is imminent.

— Reason 10 —

Settling your case is the "end game" regardless. Fewer than five percent of civil cases go to trial in California. The rest all get resolved, whether by dismissal, motion, or settlement. Why fool yourselves and your clients into believing that yours will be among those five percent of cases that go to trial (and win)?

Imagine a scenario in which, within 60 days of being retained, and after spending just a single day with a neutral and not filing any pleadings nor taking or defending a single deposition or preparing or responding to any formal discovery, you can achieve what your clients engage you to achieve: a settlement of their conflict based on a rational, thoughtful analysis of the odds of winning and losing, a careful but informal review of the evidence, and a civil negotiation conducted professionally, with a neutral expert facilitating the dialogue between the two sides. Alternatively, imagine that you engage in such an effort and find out that you don't have adequate information with which to fully evaluate the claim. After early mediation, you will have a clear path for needed discovery, a clear idea of the documents and testimony needed to prove your case or defenses, a neutral's assessment of the credibility and reliability of the proposed evidence, and both a neutral's reasoned opinion and the other side's evaluation as to the likely outcome and range of damages. This is the kind of civil practice envisioned by State Bar leadership in 2007. It is also the kind of practice clients increasingly demand. It may not always result in a settlement, but it will always be a successful way to evaluate a case before investing the time and expenses needed to get through litigation.

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