

Early Mediation — Why, When & Preparation To Maximize the Likelihood of a Positive Resolution

By Hon. Paul Herbert (Ret.)

— WHY —

1. Save your client lots of money and stress associated with protracted litigation.
2. Foster productive dialogue with opposing counsel early in the process to work together toward a reasonable resolution.

— WHEN —

There is a “sweet spot” for when to seek mediation and the earlier you can get to that sweet spot the better. How to recognize the “Sweet spot?” Here are the basic things that both plaintiffs and defendants need to accomplish first.

3. You need to have pleaded all claims and cross-claims against all viable stakeholders who have an interest in resolving the dispute. Have claims been pled in a manner that triggers a duty to defend the principal defendants.
4. You need to complete initial written discovery to identify in verified responses all potential funding sources including primary and excess insurance, any written reservation of rights from the insurers, and all substantial non-insurance assets held by the principals. Is there a self-insured retention amount that must be exhausted before insurance funds the defense and indemnity? Are there any pooling entities that will need to participate in a mediation?

5. Identify all lien holders as well as the current size of any liens.

6. Legally notify all potential stakeholders of the operative claims. (These include principals, insurers and lien holders.)

7. It’s better if you are able to work with your opposing counsel to voluntarily exchange key documents, akin to mutual FRCP 26 disclosures, and to identify (and perhaps depose) the key fact witnesses before the mediation. At a minimum, you should have interviewed the fact witnesses important to your side’s legal position and obtained sworn statements from them in advance of a mediation.

8. It’s best if you take the deposition of any opposing parties to lock them into their version of the facts giving rise to the dispute. This is important to lessen the opportunity for a mediation to be used for the improper purpose of “polishing up” either side’s version of what happened BEFORE being deposed under oath.

CAUTION -- But be targeted and efficient in your pre-mediation discovery. Cases are harder to settle the more money that has been spent on experts, attorney fees and costs, which could be put off until after an early mediation is attempted. Better to save the resources of every stakeholder as much as possible to use toward an early capping of any

exposures through a compromise settlement.

— PREPARATION —

9. Draft a concise mediation brief that summarizes the facts, legal claims, and settlement position of your client. Cite to and provide key exhibits in support of your brief.

10. Meet with your client in advance of the mediation to prepare them for what to expect at the mediation.

11. Manage their expectations to be realistic about a range of potential outcomes in mediation and the net benefits to them in time and money that come with early resolution.

12. Set your opening position (demand or offer) at a level that provides you adequate room to negotiate but does not kill hope for an early resolution.

13. Share your principal mediation brief with the other side in advance of the mediation. (Use a separate, shorter letter brief to communicate confidential information to the mediator.)

With thoughtful timing, targeted discovery, and deliberate preparation, early mediation becomes not just a strategic option, but the most efficient path toward meaningful, durable resolution.

Hon. Paul D. Herbert (Ret.) is a distinguished legal professional with over four decades of experience, known for his legal acumen, impartiality, and commitment to justice. His diverse legal background encompasses extensive trial practice, appellate work, and a comprehensive understanding of both plaintiff and defense perspectives in civil litigation. In 2013, Judge Herbert was appointed as a Judge of the Alameda County Superior Court where he served as an unlimited civil case settlement judge and assisted in the resolution of all types of civil cases except family law. Now having retired from the bench, Judge Herbert is leveraging his extensive judicial and settlement experience to help resolve disputes as a mediator, arbitrator, and referee at ADR Services, Inc.

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