Preparing to be Effective at Mediation: Stating the Obvious But the Obvious Needs to Be Restated!

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One of my biggest complaints is that some lawyers (and perhaps clients) just do not get it—that it takes considerable effort and preparation to make the mediation process work. It takes:

- A *common and good faith interest in mediation*,
- *An exchange of complete and thoughtfully prepared mediation statements* and *exhibits well in advance of the mediation date*,
- The presence of those *with authority to settle* (with real authority please!), and
- A *level of candor and disclosure* that allows the parties top assess realistically assess the other side's position.

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- And perhaps more than anything, a willingness to *listen* to what the other side has to say, along with carefully assessing the position counter to the client's.

If this is done—and it should be if counsel's representation in mediation is to meet professional standards—then there will be a full discussion and exchange of information before and during the mediation so that the chances of settlement increase.

At that time, it seemed to me that mediation had a distinct advantage because it a) brought all parties together face to face, b) involved a neutral who could be a facilitator and an evaluator, if needed, c) was a fixed process for negotiations rather than a haphazard effort to try to settle a case directly, and d) would involve principals or persons who were present who had a direct interest in resolution (e.g. the parties, their appointed representatives or their insurers).

What I am hearing now, however, is that mediation is not always the preference and some are finding mediation is not preferred. In part it is because of the cost and in some cases, because one side or the other does not take the process seriously and is not prepared. Except with ADR programs sponsored by a court system, which are at no cost to the parties, mediations are pricey in many cases. Sure, big cases with multiple parties with a lot at stake might be desirable because the costs can be shared and the mediator is needed to isolate on the moving parts and get a global deal done.

So, how do we ensure that the mediation process will work in the average mid level lawsuit? Here I elaborate on the bullet points from above:

1. **There has to be a good faith interest in resolution**. If there is not, politely decline. If the court directs the parties to mediate, then be honest if a party just wants a trial. But if you attend you must have a real interest in settlement.

One of the important items I have on my agenda as a plaintiff's lawyer is to assess how serious the other side is about going through the mediation process so as to ensure a meaningful dialogue. I often have a heart-to-heart talk with defense counsel to make sure the timing is right, the proper people are involved and the commitment is there. Or I may ask the mediator to make sure this is the case. Frankly, in most cases I do this myself, but I will inform the mediator of my intentions beforehand to make sure it is okay to proceed. Sometimes the mediator will offer to do this, which I welcome, if I think the mediator has the presence to do this effectively. I have on occasion asked permission to make this call because I feel strongly that I will be more effective because of a prior relationship with opposing counsel.

2. **The "check writer" and decision maker must be present**. I insist that this be the case or I will not attend. I ask the mediator to confirm this. I fail to appreciate how a mediation can be effective and there be good communication if this is not the case. And, the last thing I want to hear is that the key person, who was standing by the phone (!) left work at 5 p.m. Eastern Time, when I am in a mediation on the West Coast where it is only 2 p.m..

3. **The parties need to be prepared to lay out their case in full in a statement that is exchanged..** How can a mediation be effective if one side conceals its position from the other side? There can be no dialogue if this does not happen. Two page briefs from a party, or mediation statements I never see, allow me to just call off the mediation

4. **The mediation statements must be submitted well in advance of the mediation**. It is really galling to get them a day or two before the mediation.

My rule is that I send the mediation briefs out to counsel and the mediator (email and/or hard copies) two weeks beforehand. Because I am usually representing a plaintiff, I need to be sure to

get the mediation statement with my demand in time for the defendant(s) to evaluate my client's position. And it needs to be complete, a "mini" claims file with all supporting documentation. Last minute submissions of additional specials, and thousands of dollars of additional medical bills -- does not allow a defendant to review all the relevant information and seek authority so that settlement can be fully explored at the mediation. That won't happen if the statement is submitted 5 days before the mediation is to take place. Late and incomplete submissions understandably puts a defendant in a bind in its efforts to settle, and only delays the process. Also, if you email the mediation statement to opposing counsel, then it is easy to forward them on to a client or insurance carrier.

From the defense perspective, counsel needs to prepare the client representative well in advance of the mediation so any internal caucus can be conducted and appropriate authority obtained. The defense also needs time to evaluate what experts might be involved, and reports obtained. That has to be done well in advance of the mediation date. This is often a difficult task because the client representative or the insurance company claims handler is not local or is just too busy to devote the time necessary to participate in the preparation process. Plaintiff should serve a mediation statement at least two weeks ahead of the mediation date. More time is even better. Anything less than this is likely to result in a wasted day.

5. **The client needs to be prepared to make decisions before the mediation day.** On the plaintiff's side, spend a few hours going over the details of the case, the *cost* of going forward, and the dollars and cents involved if it progresses further or is tried. What is the likely outcome and how much will it cost? Use the statistics of what happens if the parties walk away;

what are the chances of a better result[2]. Look at the economics of going forward and consider the present or time value of money from the plaintiff's side. What is the value of having cash now versus the "hope" of more cash later?

6. **Be prepared to be an active participant in the process**: Be professional, meet and greet the other side and make sure all attending have met you and your client and exchanged greetings. There is no reason to be angry, hostile, or defensive. Just be a good participant in the negotiation process and see if you can get the job done – closure for you and your client.

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[2] See G. Kornblum, "Research Confirms Negotiated Results Superior to Going to Trial," San Francisco Attorney (San Francisco Bar Association, Spring 2009), which discusses the study by Dr. Randal Kaiser of Decision Set in Palo Alto, California, and which compares from both the plaintiff and defense side the statistical chances of doing better that what a settlement presents.