

## **COUNSEL'S GUIDE TO MEDIATION**

Although you are probably familiar with the mediation process itself, the information in this guide (and the accompanying guide for your clients) is designed to assist you in preparing for mediation and to increase the likelihood of resolution.

### **I. PREPARING FOR MEDIATION**

#### **A. Determine Persons Who Should Be Present**

I have found that mediations are much more successful if the parties really think about who will be present and what message they are trying to send to the other side. Plaintiffs generally respond much more favorably and quickly when they feel that their opponents are taking them seriously by bringing people with the requisite decision making authority and presence. It is important to identify the appropriate attendees for your side well in advance of the mediation, so that travel arrangements and/or time zone differences do not prevent him/her from participating and/or prevent a case from settling. Principal parties and any other person whose approval is needed for resolution should be physically present at the scheduled session or the mediator may suspend the proceeding until that person(s) can attend.

When an insurance carrier is involved, the carrier representative/decision maker should also be physically present for the mediation session. If that is not feasible, consider having that person participate by telephone in the joint session. At the very least, the decision maker for the insurance carrier needs to be reachable by telephone throughout the mediation day. If s/he is in a different time zone, be sure to have cell phone and home phone numbers in case the mediation is lengthy.

If there is a pending workers' compensation claim, consider whether you want a global resolution. Your intention to negotiate the workers' compensation claim is something that needs to be disclosed early, or the mediation will not be successful. The attorneys involved in the workers' compensation matter need to be involved, and need to have obtained appropriate authority.

If there is an individual defendant, additional issues may be present. For example, in a sexual harassment case, determine whether you want the individual accused to be present at the mediation. If the individual defendant has separate counsel, the counsel must be included for the process to be fully successful.

#### **B. Determine What Documentation To Prepare and/or Exchange**

Providing a useful brief to the mediator in advance of the mediation is critical to the success of your mediation. Presumably, you have chosen me to mediate your dispute

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because of my legal experience; therefore, you do not need to set forth a basic textbook presentation. Focusing on the strengths and weaknesses of the case in the brief gives me the information I need to use with the other side. Of course, where there is a unique or difficult legal issue, a more in-depth discussion is appropriate. You should also consider appending reports of jury verdicts and/or recent relevant decisions in similar cases to your brief. Consider appending probative documents.

If there are major factual discrepancies between the two sides, consider bringing declarations of witnesses to the mediation for the mediator to review in private. Alternatively, consider having critical witnesses available to speak directly with the mediator.

For counsel representing plaintiffs on employment cases, it is important to reasonably and realistically calculate damages for lost wages. Bring information about former and current compensation and benefits. Know whether your client wants to seek reinstatement. If you are seeking damages for emotional distress, bring information to support your claim, i.e., medical reports and expenses. If there are any objective criteria to measure appropriate damages, it should be presented to the mediator and opposing counsel. Charts are helpful when explaining calculations of back and front pay losses, or salary history. Be prepared to discuss mitigation issues, including whether your client will consider reinstatement and/or continuation of benefits. If there are any legal issues regarding damages, be prepared to present current precedents. For counsel representing defendants, it is important for you to have discussed with your client the possibility that damages could be awarded against them as well as the types and amounts of damages that could be awarded.

Exchanging briefs with your opponent(s) typically reduces the amount of time spent during the mediation exploring factual issues and positions, especially where the matter is being mediated pre-discovery. Any confidential information you wish the mediator to know can be provided in a private letter to the mediator or during a private caucus. Always advise the mediator of the history of any previous settlement discussions.

### **C. Evaluate Your Settlement Position**

Have your client clarify his/her interests or needs, as compared with his/her legal position. We think it crucial that you and your client come to the mediation with an open mind, open to the possibility that you may not have all the facts and that your settlement expectations may not be realistic.

In order to properly evaluate your case for settlement, you must critically evaluate the likely outcome if the matter is arbitrated or litigated. An assessment should be made of the

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litigation costs, including expert witness and attorneys' fees, court costs, time expenditures, the effect on career or workplace, emotional impact, disruption, publicity and precedential effects. You should also consider how the other side is likely to evaluate the probably outcome and cost factors, and how to change that evaluation.

#### **D. Participate In A Pre-Mediation Conversation With The Mediator**

Unlike arbitration or litigation where *ex parte* communication with the judge or arbitrator is prohibited, counsel should make every effort to communicate with the mediator before the mediation. Give the mediator advance notice of any problems you expect to encounter, educate him or her on the dynamics of your relationship with opposing counsel, and the parties ability to communicate with one another. I usually schedule a pre-mediation conference separately with each side the week before the mediation date.

### **II. THE MEDIATION SESSION**

Ensure that you schedule enough time for the mediation. Do not allow any other commitments to short circuit the mediation process. Exploring the facts, positions, and interest of the parties and counsel takes time; it is important for you to remember, and remind your client, to be patient.

#### **A. The Joint Session**

I typically meet with you and your client separately before convening a joint session with all parties and counsel present. At that time, I will introduce myself, answer any questions about process, and explain the purpose and workings of the joint session. I will also give you input and/or suggestions regarding the effectiveness of your anticipated comments during the joint session, if it is determined that a joint session should be held.

The objective of your opening statement in the joint session is to have the decision makers come to a point at which they can see, even if not agree with, the other side of the dispute. Be willing to concede obvious points; it will increase your credibility with the other side. In addition, I have found that it can be quite impactful for the parties to actually speak to each other in a joint session. Consider whether your client should use this opportunity and help the client prepare a persuasive presentation. Many counsel are leery of allowing the clients to speak, but I have found that even a short placatory statement can set the right tone for the mediation. It is most effective when the opening statement, whether by counsel or the party, is factual rather than accusatory.

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During the joint session everyone present will sign the Mediation and Confidentiality Agreement, a copy of which has been included with your confirmation letter. I will make some remarks about the mediation process and the logistics of the day. The joint session may last a short time, or much longer, depending on the parties' wishes and how fruitful the session appears to be.

### **B. The Private Caucus**

During the private caucuses, reality testing will occur. I suggest that you be willing to acknowledge weaknesses in your case, while emphasizing strengths, and more importantly, that you be realistic. Do not make unsubstantiated and outrageous demands or offers. Educate your client that the negotiation process is a deliberative one, the beginning demands and counter offers are part of a process of compromise.

I may meet privately with you outside the presence of your client, if such is determined to be a helpful way to obtain or impart information. Remember, ex parte communication with the mediator is appropriate.

### **C. The Settlement Agreement**

There are myriad options to consider when reaching resolution. The beauty of mediation is that you are not limited to what a court or arbitrator might award. More creative solutions are possible. For example, in employment cases, items you might discuss with your client are reinstatements, transfer, continuation of benefits, either at the employee's or employer's expense, consultant agreements for ongoing services, outplacement services, training programs, early retirement options, deferred payment plans, characterizing the monies paid as something other than wages, agreed upon reference letters and/or public statements, expungement of personnel file, personnel policy changes, contributions to pension plans or charities, direct reimbursement of attorneys' fees, and/or extension of stock option periods.

When a settlement is reached, I strongly encourage the parties to finalize and sign an enforceable settlement agreement before the mediation is adjourned. At a minimum, be prepared to execute a deal points memo. Please bring a draft agreement to the mediation session, or have the ability to obtain one from your office, via e-mail or fax. As a rule, I do not draft any settlement documents. I suggest you bring a laptop to assist in drafting the Settlement Agreement.

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