What Makes a Successful Pre-Mediation Brief: A Conversation with Esteemed Neutral Hon. Anna H. Demacopoulos (Ret.)

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Aug 21, 2024 5 min read

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"When you mediate, the power and control is within the parties' hands. When you litigate, the power is in the decision-maker's hands and that is the judge and the jury… Through mediation, the parties have the power to control the resolution of the dispute…" – Hon. Anna Demacopoulos (Ret.)

Mediation can be an incredibly useful tool to resolve cases at all phases of the litigation process. Ahead of successful mediations, neutrals and advocates alike often author and/or review pre-mediation briefs. With this in mind, it begs the question – what makes a

successful pre-mediation brief? I sat down with the Hon. Anna H. Demacopoulos (Ret.), JAMS neutral, to find out.

Judge Demacopoulos spent over fifteen years on the bench in Cook County, Illinois before transitioning to mediation. In doing so, she immediately authored guidelines for advocates to abide by in advance of mediation. Notably, her guidelines begin by advising the parties that "a successful mediation allows the Parties to avoid the substantial cost, expenditure of time, and stress that are typically a part of the litigation process." She outlines nine points that advocates should address in pre-mediation briefs:

1. What are your goals in the mediation?
2. What do you believe are the opposing side's goals?
3. What are all of the issues to be resolved?
4. What are the points of agreement and disagreement between the Parties? Factual? Legal? Financial?
5. What are the impediments to settlement? Financial? Emotional? Legal?
6. Does settlement or litigation better enable you to accomplish your goals?
7. Are there possibilities for a creative resolution of the dispute?
8. Do you have sufficient information to discuss settlement? If not, how will you obtain the necessary information to make a meaningful settlement discussion possible?
9. Are there third parties, including insurance carries, who should be invited to participate in the mediation conference?

Judge Demacopoulos emphasized that "litigation is the path of most resistant – settlement gives the Parties the most control." In order to capitalize on that control, Parties should prepare for mediation and provide their neutral with as much information as possible to help move the needle towards resolution. This, indeed, is the purpose of a pre-mediation brief.

Pre-mediation briefs are often submitted to neutrals ahead of mediation to provide them with the information necessary to prepare. As an advocate, the question often becomes – how much information is too much? Judge Demacopoulos provided some clarity advising "it is less about length, and more about providing sufficient information." She further advised "a neutral's job is not to tell people who is right and who is wrong, nor who should

win and who should lose. A neutral's job is to identify the risks that both parties take if they continue to litigate." These risks can be outlined by the parties in their submissions. What is more, neutrals are then equipped to further discussions and assist the parties in reaching an amicable resolution.

Whether you are a neutral looking to revise your pre-mediation guidelines, or an advocate preparing for mediation, it is critical to help the Parties understand what the litigation path looks like. Neutrals can do this through pre-mediation calls or meetings, and advocates can do this by ensuring that they truthfully, and accurately, describing the litigation processes to their respective clients. Judge Demacopoulos stated "many times, clients come in and are past the summary judgment stage. They have invested hundreds of thousands of dollars and are years into litigation. At that point, clients will say they want to see it through. Compare this to a client who has been advised of the risk by their counsel before they incurred these expenses."

In determining what to incorporate into the pre-mediation submission, Judge Demacopoulos stated that parties need to discern (1) what the party needs vs. (2) what the party wants. "A need is something that addresses their everyday minimal requirements and what they need to go on with life. A want is attached to an emotion. And, let's face it – most litigation is attached to and driven by an emotion." Judge Demacopoulos tries to take that out of the equation and reads between the lines. This is a tactic neutrals can implement to reach successful outcomes.

For advocates, submissions should detail their willingness to resolve. Neutrals can better assist the parties when there is a desire to resolve. Judge Demacopoulos indicated that as a neutral, she is not looking at what the real value of the case is, but rather, what the case will settle at. Thus, any submission that simply advises "I am right," is not helpful to advance the case.

Often times, Parties are at odds over more than just finances, hence Judge Demacopoulos' inquires in her pre-mediation brief guidelines. Moreover, Judge Demacopoulos always makes this inquiry when conducting her pre-mediation calls. She stated that Parties are often surprised when she asks if there are any personal impediments to settlement, but those issues can often pose the biggest threat to resolution if not properly addressed. When something is preventing resolution beyond the dollar sign, neutrals have the opportunity to show their creativity and deal-making abilities. Neutrals who assist in creating options for resolutions are more likely to be successful. The goal is to address the underlying need. Likewise, advocates who address potential options in their pre-mediation briefs often fair well with neutrals as it demonstrates a desire to resolve.

There were two topics that Judge Demacopoulos and I discussed that weigh heavily on neutral preference. The first topic was whether pre-mediation submissions should remain

confidential or be shared with the Parties. The second was whether a neutral should require a demand ahead of the mediation session.

Judge Demacopoulos has a preference for both, but respects other neutrals who may have different approach. With respect to confidentiality, she advised, "if you have information that you want to leverage, why wait?" She detailed that information making a party's case stronger should be shared ahead of mediation in order to leverage their case at this phase, as opposed to wasting time and money disclosing it in litigation. As to the demand, she likes to see one, but does not require same. She does, however, advise that the lack of a demand often leads to longer mediation sessions as it can take the neutral time just to get the negotiations started.

In sum, the purpose of pre-mediation briefs is to provide the neutral and the advocates with the requisite information to manage and further the mediation session. "The more information neutrals have about what will get the parties to move is helpful. As an advocate, digging your heels in to convince the neutral that 'you are right,' provides no tools to move forward. No one starts a lawsuit thinking they are going to lose – on either side."

Judge Demacopoulos made a fantastic point, and emphasized a critical questions she asks all Parties ahead of mediation – ***What is the cost of winning? What does a win actually look like to you?*** By asking the advocates and their respective clients this question, neutrals can walk a party back from a win and discuss how, and how much, it will cost to get to that point. Mediation can often be used as a tactic to avoid lengthy litigation schedules and costly procedures. To be sure, this helpful process commences with pre-mediation tactics.

As an advocate, you should make sure that your pre-mediation submission aligns with your perspective on settlement. As a neutral, consider these pre-mediation tactics to promote successful mediations at all stages. As Judge Demacopoulos once stated "mediation is a serious process that requires thoughtful preparation prior to the Mediation Conference." It all starts with pre-mediation.

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