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On your marks, get set, mediate!

By Lou Marlin

To be successful, a mediation should start long before the formal gathering of the parties. In fact, the process of resolving a case through mediation starts at the commencement of a case, and involves a series of actions by all involved that can facilitate or hinder the formal mediation hearing.

A successful mediation is rarely a "static" event, with little that precedes it having an impact on the outcome. Rather, it is a dynamic process which, if considered from the inception of a case, can lead to a result that will satisfy (if not please) the litigants. The fact is that the vast majority of civil cases ultimately settle, and mediation appears to be the prime vehicle driving those results. Still, attorneys can bolster the chance of not only reaching a settlement, but reaching one with less animosity and greater acceptance by all involved.

The following are some of the key "way points" in the litigation of a case that can aid in the ultimate resolution of litigation to the satisfaction of your client:

First Contact Between Counsel

The initial contact between opposing counsel can be critical. Expressing — and following through on — an honest willingness to be cooperative, to extend professional courtesies, and to attempt to avoid unnecessary motion practice can go a long way to forging a fruitful relationship. As experienced and successful litigators know, being cooperative, courteous and professional does not mean giving up your passion for representing your client to the best of your abilities. These attributes help create an atmosphere where you can work vigorously and effectively, with the realistic knowledge that ultimately you have to talk to the attorney on the other side about settling the case for your client's benefit.

If an attorney's word is proven to be truthful early on, then representations made during a mediation tend to be given a great deal of credibility. If opposing counsel is not angered by having to respond to endless and essentially unnecessary pre-trial litigation, she is more likely to approach the mediation in a non-confrontational and cooperative manner. Simply put, there is little benefit to being an uncooperative and confrontational opponent, and great benefit in being viewed as a reasonable and capable adversary.

Realistic, Reasonable Discovery

Discovery is an essential tool in litigation, and is often a foundational prerequisite to a successful mediation. Experienced litigators are unlikely to engage in the necessary "give and take" of a mediation if they feel that either they have been bombarded with irrelevant and harassing discovery requests, or more importantly they believe the other side has been actively withholding information in discovery.

Too many mediations are stalled by complaints by one side or the other that they have been denied important, required and sought-after discovery. There is no benefit in wasting time and effort at a mediation debating what has or has not been produced. This results in the mediation degenerating into the mediation of discovery disputes, as opposed to being an attempt to actually resolve a case. Time and again, a second day of mediation is necessary because the first day was spent resolving discovery issues that should have been resolved much earlier.

Disclosure of Information

Whether asked for or not, it is vital that both sides provide all information they have in their possession that the other side would reasonably request as foundational to a settlement. In most mediations, this means information and data from which each side can prepare their own damage calculations.

It is important to keep in mind that information can be produced for mediation purposes only, and that such information is not subject to disclosure simply because it was disclosed in mediation. See California Evidence Code Section 1119. A simple exchange of emails confirming that specific information is being disclosed for mediation purposes only, and an agreement by the other side with this proposition, will protect your client and allows for full disclosure. No doubt, attorneys sometimes have to balance what they disclose in the hope that mediation will be successful, with the concern of not revealing too much if it proves not to be. It's best to err on the side of greater disclosure, leading to increased chance of resolution. And, if the information is truly not subject to discovery, disclosure in mediation does not change its protected character.

Exchange of Mediation Briefs

Attorneys are often reluctant to exchange mediation briefs for reasons ranging from want to "surprise" the opposition at the mediation, to an unwillingness to allow the other side to review a discussion of information that will not be ultimately disclosed to the other side at the proceeding (i.e., the financial condition or needs of a party that might impact settlement value).

In most cases, this reluctance is not well grounded. The benefit of exchanging briefs is based upon the premise that the parties approach mediation with an honest intent to resolve the litigation. To do that, giving the other side an opportunity to review, evaluate and prepare a response to your arguments prior to the mediation means that the actual discussion can get to substantive issues quicker and more efficiently.

It is understandable that an attorney might not want opposing counsel to see an unabridged version of a brief, particularly if it contains a frank discussion of the weaknesses of a position as well as the strengths. I have frequently seen "abbreviated" briefs, where the parties agree the exchanged briefs will be limited to topics such as a statement by each side of the facts as they see it, and a discussion of disputed legal issues. These prove quite helpful so that the mediation itself can address factual and legal issues in dispute earlier in the process.

I have been asked by attorneys if I think damage calculations and demands should be provided in these abbreviated briefs. There is no one right answer. However, providing the other side with a demand or offer in an exchanged brief — despite the fact that both sides know these are "opening" numbers only — can result in a knee jerk reaction that can jeopardize a mediation. Thus, I generally recommend against it.

Pre-Mediation Conference

The final step in the first stage of mediation is a pre-mediation telephone conference with your mediator. In today's mediation practice, these calls are quite common and serve a useful purpose. This conference, with each side speaking separately with the mediator, gives the attorneys an opportunity to give the mediator a "heads up" in regard to any particular issues that might present a roadblock to resolution. This can range from communication problems between counsel, to discussions of lack of cooperation in providing necessary damage data. Armed with this information, the mediator can take steps prior to the mediation to attempt to remove these roadblocks. For example, a call from the mediator to an attorney reluctant to provide the other side with critical information prior to the mediation usually results in a change in that dynamic. Thus, the pre-mediation conference is much more than a quick "how do you do" with your mediator. It is a critical part of the mediation process itself.

Viewing mediation as a dynamic process that begins at the very inception of a lawsuit can have a major impact on your ability to assist your client in resolving a case. Keep in mind that your case will likely result in a mediation, and planning ahead will increase the likelihood of success.

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