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Go on, share with opposing counsel

By Lou Marlin

Mediations are unique in the litigation field in that *ex parte* communications with the mediator are permitted. The underlying justification for this rule is that it promotes candid communication between attorneys and the mediator, thus increasing the chances of a mutually satisfactory settlement.

With this in mind, the common practice is to designate mediation briefs as "Confidential: Not to be Shared With Opposing Counsel," or a similar notation. This is understandable and a valid position for counsel to take in order to be fully candid with the mediator. However, in many, if not most, situations some sharing of information prior to the mediation by the parties can often have a very positive impact on the mediation process itself. While it may not be practical to share an entire mediation brief with the other side, an abridged version can often prove very useful to your side.

There are numerous situations where sharing a portion of a mediation brief with opposing counsel can prove useful. Some examples follow:

Data Analysis

Often prior to mediation, the parties have engaged in formal or informal discovery that has included the sharing of important data. By example, in the employment field, items such as weeks worked during the claim period, average hourly wage rate, etc. are important items in connection with damage calculations. Sharing the results of the analysis of these data prior to mediation can often avoid problems that can slow down or even derail a mediation. If the plaintiff assumes the average hourly wage rate provided by the employer includes consideration of non-discretionary bonuses, and the defendant employer, in fact, did not include the same in the provided rate, the parties may well have significantly different calculations of potential damages. By resolving those differences prior to the mediation, significant time can be saved for discussing the issues that truly impact the ability of the parties to settle. Merely agreeing on the meaning of data and understanding how both sides use these data does not constitute an admission by either side in connection with liability.

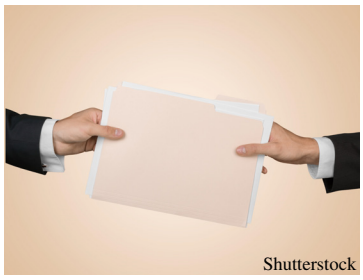
I have handled several mediations where the parties exchanged the results of their data analysis and found them to be substantially different. This was disclosed by both sides during pre-mediation telephone conferences. I encouraged both sides to meet to determine why the two sides came to different results while using the same data. In each case, the pre-mediation resolution of these problems set the stage for a successful mediation.

Factual Conclusions

Often, mediations can turn upon facts that are in dispute between the parties. In the simplest of examples, the issue of which party had a green light at an intersection where a T-bone accident occurred can be a critical issue. If you are going to firmly take the position that you can prove this fact, then letting the other side have some knowledge of the factual conclusion you are relying on, and the basis for that reliance, focuses both sides on this important issue that may be critical to case resolution. While the other side may be sure they can disprove the very fact you are relying on, the highlighting of this issue before the mediation can mean that both sides are prepared to address the same. Any time the parties at mediation are talking about the same issues, the odds for resolving a case improve.

Dispositive Legal Arguments

Raising a purportedly dispositive legal argument for the first time at mediation is counter-productive. Few attorneys will cave at mediation under these circumstances. If you believe you have authority that resolves all or part of a matter, disclosing your position in a shared mediation brief gives the other side the opportunity to be prepared to respond at the mediation. This permits the mediator to have a balanced presentation of a legal argument so that he or she can give neutral input as to the efficacy of the argument or of the response thereto. Keep in mind that the purpose of mediation is to reach a mutually satisfactory result. Mediation is usually not the place to "win" your case.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Expert Reports

If you intend to use an expert's report or conclusions at mediation, consider disclosing the conclusions in your abridged mediation brief. While attorneys are always sensitive to disclosing their experts, as well as the experts' opinions, early in the litigation process, giving the other side some information of what will be argued by your side at the mediation can be very helpful. In doing this, you would not necessarily have to identify the expert as opposed to disclosing the expert's opinion (keeping in mind that it would be unethical to create an expert opinion out of whole cloth, as this would amount to a misrepresentation of a material fact at mediation, which is strictly prohibited. See Business and Professions Code Section 6128; *ABA Model Rules* 4.1 and 8.4).

Financial Impediments

It is not unusual for defense counsel to raise his or her client's strained or dire financial condition at mediation as a way to convince the other side to lower their settlement expectations. While this is certainly an acceptable mediation position to take, raising this issue for the first time at the mediation itself is often a huge stumbling block to settlement. An experienced plaintiff's attorney may well feel the need to do his or her own due diligence to investigate the defendant's financial position.

Often, I learn of this type of financial problem during a pre-mediation phone conference with defense counsel. I encourage defense counsel to provide whatever written documentation he or she has available to opposing counsel to substantiate the claim of financial hardship. To facilitate this, I obtain an email agreement from both sides that the exchange of this financial information prior to the mediation is subject to the mediation privilege. Once this is done, the information is provided as part of the defendant's shared abridged mediation brief.

It can be difficult for attorneys to agree to voluntarily disclose information to opposing counsel. However, in the mediation context, carefully considered and thoughtful pre-mediation sharing of information can prove beneficial toward the result your client likely wants — an acceptable settlement.

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