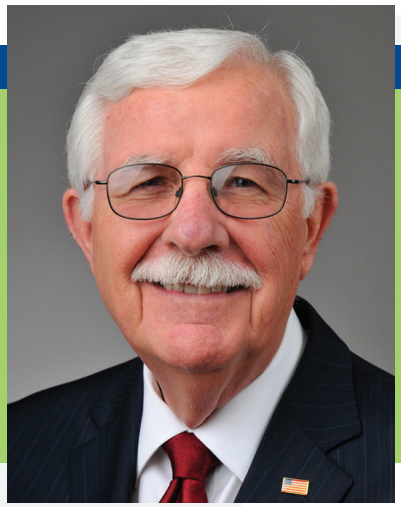

Preparing for Mediation

By Hon. Kevin W. Midlam (Ret.)

Once it is determined that the case is headed to mediation, then it is essential to prepare. While it is commendable for counsel to avoid expensive discovery and law and motion, it is in the best interests of a successful mediation to have factual and legal issues resolved as much as possible before initiating the process.

Before setting up a mediation, the case should be thoroughly and objectively analyzed with the client. Strengths and weaknesses should be candidly assessed. Allowing a client to foster unrealistic expectations of the value of a case or the odds of success will generally result in a failed mediation and, if the expectations are not vindicated in trial or arbitration, create potential adverse consequences between client and counsel.

A corollary to the above analysis is to insure that the client understands that the mediation process is not one of judgmental nature but instead one of negotiation and compromise. A "We Win, They Lose" approach is antithetical to the process.

The recognition that mediation requires compromise mandates that those who participate in it must aim to achieve an agreement based upon finding a middle ground that, if not particularly palatable, is at least acceptable to all sides.

Mediation is an interactive exercise that requires the active participation of the clients, and they should be adequately prepared for such. Mediators want to hear from clients. It helps them to evaluate the person as to emotional and credibility issues as well as objective expectations. How a client presents in mediation is, therefore, very important.

In order to insure that there is full and honest disclosure of facts surrounding the controversy, it is very important to stress to the client that the mediation privilege set forth in the statutes in California is very strictly enforced by the courts.

Joint sessions in which all the attorneys and the parties make presentations can be beneficial and serve to provide each side with a different

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perspective of the dispute. However, there is also the risk that what occurs at such a session will cause positions to become polarized, rendering compromise extremely difficult to achieve. Before proposing a joint session or in responding to a mediator's request as to its appropriateness, analyze the pros and cons of the process. If a joint session is held, insure that your presentation is consistent with compromise and not confrontation.

It has become common practice, at least in Southern California, for attorneys to file confidential mediation briefs with the mediator and not share the brief with the opposing side(s). This is a practice that should be reexamined. The entire field of litigation has been restructured over time to discourage, if not eliminate, "trial by ambush." All of the proceedings around litigation are designed to provide full disclosure. Rarely is any "smoking gun" evidence set out in a mediation brief so devastating that it would completely destroy the opposition. If such were the case, then it should be disclosed so that the opposition can fully evaluate it and perhaps change its position. In general there is more to be gained by an exchange of mediation briefs. It can avoid significant delays in determining whether or not the parties are on the same page regarding the facts and the applicable law.

Whether briefs are exchanged or not, they should definitely be utilized and provided to the mediator with sufficient lead time to permit the reading and digesting of them. Briefs arriving on the evening before or, even worse, the morning of the mediation will cause delays in the process and a limited understanding of the case from a factual and legal standpoint by the mediator. In order to ameliorate the effect of late briefs, mediators should initiate calls to the counsel for the parties to discuss the issues before the hearing.

In summary, of the points set out above:

1. Be thoroughly prepared on the facts and the law of your case by objective analysis.
2. Prepare your client thoroughly for mediation.
3. Mitigate, to the largest extent possible, the emotional aspects of the case and never do anything that will cause the emotional aspects of the case to impede or influence the mediation or cloud the use of good judgment.
4. Have reasonable alternatives to resolution prepared for the mediation.
5. Propose a protocol for the mediation hearing that will maximize the potential resolution and minimize the polarization of the parties.
6. Provide the mediator in a timely fashion with sufficient information so that the hearing is utilized to reach resolution and not, in fact, finding and legal arguments.

Hon. Kevin Midlam (Ret.) is a JAMS panelist in San Diego. He previously served on the San Diego Superior Court bench and has decades of experience resolving complex, multi-party disputes. To learn more, visit his bio at www.jamsadr.com/midlam.