

EFFECTIVE MEDIATION

Stating the Obvious Because the Obvious Needs Restating

Guy O. Kornblum

It takes considerable effort and preparation to make the mediation process work.



Successful mediation takes:

1. A common and good-faith interest in mediation
2. An exchange of complete and thoughtfully prepared mediation statements and exhibits well in advance of the mediation date
3. The presence of those with authority to settle
4. A level of candor and disclosure that allows the parties to assess realistically the other side's position
5. And perhaps, more than anything, a willingness to listen to what the other side has to say and carefully assess the position counter to the client's



If this is done—and it should be, if counsel’s representation in mediation meets professional standards—then the full discussion and exchange of information before and during mediation increases the chances of settlement.

Mediation has a distinct advantage over direct negotiation because it (a) brings all parties together face to face, (b) involves a neutral who can be a facilitator and an evaluator, if needed, (c) offers a process for negotiations rather than a haphazard effort to try to settle a case directly, and (d) involves principals or persons who are present who have a direct interest in resolution (for example, the parties, their appointed representatives, or their insurers).

Mediation is not always preferred, sometimes because of the cost or, in some cases, because one side or the other does not take the process seriously and is not prepared. Except with

court-sponsored ADR programs, which are at no cost to the parties, mediations are pricey in many cases.

So, how do we ensure that the mediation process will work in the average midlevel lawsuit?

1. There has to be a good-faith interest in resolution. If there is not, politely decline. If the court directs the parties to mediate, be honest if a party just wants a trial. But if you attend a mediation, you and your client must have a real interest in settlement.

To ensure a meaningful dialogue, one of the important items on my agenda as a plaintiff’s lawyer is to assess how serious the other side is about going through the mediation process. I often have a heart-to-heart talk with defense counsel to make sure the timing is right, the proper people

are involved, and the commitment is there. Or I may ask the mediator to make sure this is the case. In most cases I do this myself, but I inform the mediator of my intentions beforehand to make sure it is okay to proceed. Sometimes the mediator will offer to do this, which I welcome, if I think the mediator can do this effectively. I have on occasion asked permission to make this call when I feel strongly that I will be more effective because of a prior relationship with opposing counsel.

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2. The parties need to lay out their case in full in a statement that is exchanged with the other side. How can a mediation be effective if one side conceals its position from the other? There can be no dialogue if the exchange is not open. Two-page briefs from a party, or mediation statements I never see, do not allow the negotiations and exchange that are essential to the process. In such a situation, I decline the opportunity as proceeding will be a waste of time for all concerned.

3. The “check writer” and decision maker must be present. I ask the mediator to confirm that this be the case or I will not attend. How can a mediation be effective and there be good communication if this is not the case? And, the last thing I want to hear is that the key person, who was standing by on the phone left work at 5 p.m. eastern time when I am in a mediation on the West Coast where it is only 2 p.m.

4. The mediation statements must be submitted well in advance of the mediation. My rule is that I send the

mediation briefs out to counsel and the mediator (email and/or hard copies) two weeks beforehand. Because I am usually representing a plaintiff, I need to be sure to get the mediation statement with my demand to the defendant(s) in time for them to evaluate my client’s position. And the statement needs to be complete, a “mini” claims file with all supporting documentation. A defendant cannot review all the relevant information and seek authority so that settlement can be fully explored at the mediation when there are last-minute submissions of additional specials or thousands of dollars of additional medical bills. A full review cannot happen if the statement is submitted only five days before the mediation is to take place. Late and incomplete submissions understandably put a defendant in a bind in the effort to settle and delay the process. If you email the mediation statement to opposing counsel, then it is easy to forward it to a client or insurance carrier.

From the defense perspective, counsel needs to prepare the client representative well in advance of the mediation so any internal caucus can be conducted and appropriate authority obtained.

Well in advance of the mediation date, the defense also needs time to evaluate what experts might be involved and to obtain reports. This is often a difficult task because the client representative or the insurance company claims handler is not local or is just too busy to devote the time necessary to participate in the preparation process. Plaintiff should serve a mediation statement at least two weeks ahead of the mediation date. More time is even better. Anything less than this is likely to result in a wasted day.

5. The client needs to be prepared to make decisions before the mediation day. On the plaintiff’s side, spend a few hours going over the details of the case, the cost of going forward, and the dollars and cents involved if the case progresses further or is tried. What is the likely outcome and how much will it cost? What happens if the parties walk away? What

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THE EXCHANGE IS NOT OPEN.**

are the chances of a better result?¹ Look at the economics of going forward and consider the present or time value of money from the plaintiff's side. What is the value of having cash now versus the “hope” of more cash later?

6. Be prepared to be an active participant in the process. Be professional, meet and greet the other side, and make sure all attending have met you and your client and exchanged greetings. There is no reason to be angry, hostile, or defensive. Just be a good participant in the negotiation process and see if you can get the job done—closure for you and your client.

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Note

1. See G. Kornblum, “Research Confirms Negotiated Results Superior to Going to Trial,” San Francisco Attorney (San Francisco Bar Association, Spring 2009), which discusses the study by Dr. Randal Kaiser of Decision Set in Palo Alto, California, and which compares from both the plaintiff and defense side the statistical chances of doing better than what a settlement presents.



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