A successful mediation requires preparation, flexibility and trust

Mediation Memo

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Mediations resolve cases. What is the best use of the process and the mediator to obtain the desired result?

Pre-mediation steps

Before agreeing to mediate a case, counsel should analyze whether the case is ready for mediation. Whether a case seems simple or not, counsel needs to determine if there is enough relevant information — favorable and unfavorable — to determine a valuation range for the case.

In many cases, the parties may want first to take key fact depositions, and in some instances, expert depositions, to gauge a witness' effect on a case, before agreeing to mediate.

After the parties agree to mediate, the parties must agree on a neutral. The initial reaction of a newer attorney may be to search for neutrals who are "plaintiff oriented" or "defense oriented" or someone who is an "expert" practitioner in a specific area of law.

This approach can be misguided.

Being an expert in an area of the law does not always equate to an effective mediator. A good mediator is trained and experienced in facilitating the disputing parties toward a voluntarily resolution. Counsel should consider a number of neutral candidates, do some due diligence with other attorneys, and have an idea of a neutral's ability and skills to be a "closer" and help settle cases.

Before the mediation, counsel should have thought about and discussed with their client issues such as the length of the mediation; whether the mediation will be in-person or remote; the length of mediation submissions (and whether they will be shared or confidential to the neutral); and whether parties want to give opening statements. The

neutral may hold a short remote meeting to discuss and make certain there is agreement on these issues.

The written mediation submission is vital in educating the neutral about a client's case. Whether a confidential submission or shared, a mediation submission should be a direct and concise statement of the facts of the case, legal and factual issues, and an explanation of claimed damages.

It should not be a document dump of exhibits without context. Avoid overstating a client's case.

Importantly, an effective submission should address any glaring weaknesses of the case, and explain why the negative fact or legal issue has minimal or no effect on the value of the case. The mediation submission should also include a summary of settlement discussions, including the most recent demand and offers.

The session itself

Some neutrals recommend (at the pre-mediation meeting), that the parties give opening statements. Sometimes opening statements are counter-productive and can offend a party, causing a party to become more entrenched in a position than ever.

If an opening statement is given, keep it to a short explanation of your case, and be respectful. Hyperbole and personal attacks may impress your client, but are far more likely to derail the mediation. A skilled mediator can get the process back on track. But obnoxious opening remarks are a huge waste of time.

During mediation, as the neutral hosts private meetings with each side, counsel and client need to be patient. Keep the mindset that mediation is a process. When the neutral meets with you and your client, be prepared to discuss the case, the evidence and law and a response to the opponent's position.

While the initial demand and offer may provide some insight, it is advisable to avoid speculation and "outrage," as your opponent is likely testing your client's response. Parties are often a seemingly insurmountable distance apart even after several "rounds" of private meetings with the neutral, and even where the "moves" seem ridiculously small. Keep working at it with the neutral and your opponent.

Very often, after many rounds of "micro moves," parties become willing to make a substantial move, leading to a settlement. "Movement is life," as has been accurately stated, so it is important to have faith in the process. Discuss with the neutral the use of "brackets" and other mediator tools when the incremental moves do not result in any breakthrough movement.

Document the settlement

If the case is settled at mediation, before any party and counsel leaves the session, the neutral will prepare (or counsel can draft) a written settlement agreement or memorandum of settlement that is signed by all parties. Make certain that all claims, liens and significant costs are accounted for in the settlement.

While there may be a need for longer settlement agreements after mediation, the settlement amount and all material terms should be in writing and executed by each side. If possible, have a full release document at the ready during the mediation, as this will save both sides considerable time.

By utilizing some of these tips, counsel can be more confident in using mediation as a cost-effective means of resolving lawsuits.

Practice Areas: Mediation
General Categories: Professional Development