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Nine Ways for Counsel to Prepare for Mediation

Once the mediator and a date for mediation have been selected, the question then is how best to prepare for the mediation. Attorneys know how to prepare for trial: motions in limine, evidence, witness exams, and opening statements. How to get ready for mediation is not as obvious. Here are nine suggestions for counsel to best prepare for mediation.

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Don't resume negotiations prior to mediation.

Mediation is typically elected after counsel has explored settlement, found the parties too far apart and initiated litigation. Once the parties agree to mediate, it is then best not to negotiate further until the mediation. Offers made or positions expressed a short time before the mediation may set a floor or ceiling for the negotiation and can create unrealistic expectations. The mediator's function and expertise is to set expectations and guide negotiation in ways to maximize the opportunity to reach agreement.

Discuss procedure with the mediator. The mediator is there to be of service to you. It is your negotiation. If you feel strongly about whether there should or should not be a joint session, let the mediator know. If the mediator disagrees, be open-minded. Trained in what works in the ebb and flow of the process, the mediator will recommend whether, when and what kind of joint session should be held.

Have a meaningful private conversation with the mediator. It can be helpful to meet with the mediator without your client present to candidly discuss strengths and weaknesses of the case. You can also request the mediator's assistance to guide your client to a more realistic position. In mediation, unlike arbitration, ex parte communications are not only appropriate but encouraged. Thus, you can raise these and any other points with the mediator at or before the mediation.

Be prepared with the most persuasive law and facts. In addition to coming into mediation flexible and ready to negotiate, attorneys should be prepared to argue their best case. The decision to mediate does not lessen your duty to be a zealous advocate. Before mediation, a brief is submitted either for the mediator's eyes only or shared with the other side. In the latter case, the mediator may then be provided also with a supplemental brief or letter for the mediator's eyes only. It is critical to provide the mediator with controlling precedents and governing laws. Also, quite helpful are verdicts in similar cases (particularly from the courthouse in which your case

will be tried) and reported settlements in similar cases. Be prepared to argue your position from the head and, in cases with a compelling emotional component, from the heart.

Have present at the mediation the decision makers and those upon whom the party will rely. Any key decision makers, including anyone the party would rely on to make a final decision such as a spouse or confidant, and the key insurance adjusters should be present. If a decision maker cannot be in attendance, the mediator and the opposition parties should be informed before the mediation to assess the alternatives, e.g. telephonic appearance.

Share what you plan to do in the litigation should the case not settle in mediation. Be ready to share, for the most part, what production and other discovery you intend to pursue if no settlement is reached, including party, witness and expert depositions. You should be ready to approximate the length of trial and share which kind of experts you intend to use.

Have an estimate of the fees and costs incurred and projected fees and costs should the case not settle. These figures of past and future expenses are clearly relevant in a mediation where attorney fees and costs are recoverable by the prevailing party by law or contract. These numbers may also be of use by the mediator in cases where fees and costs are not recoverable.

Consider the value your client places on being free of the anxiety and uncertainty caused by the ongoing dispute. Most parties tend to find the anxiety of being engaged in an ongoing conflict deeply uncomfortable. Their tolerance for living with the uncertain outcome of a prolonged litigation is unique to their individual temperament, but most will ultimately place a value on being able to trade uncertainty for certainty. In order to effectively exhaust the mediation opportunity, one should not just account for the unknown future ruling and the real costs to get there, but also the value to the client in achieving immediate certainty and peace.

Be prepared with specific terms to include in a settlement agreement or memorandum of understanding. Most mediations that settle end with the signing of a settlement agreement or at least a memorandum of understanding intended to be binding and enforceable under California Code of Civil Procedure Section 664.6. Most mediators will have a form memorandum of understanding and settlement agreement, but before mediation you should know the particular terms required for a settlement for your type of case. You should also be cautious of unenforceable terms. Some plaintiffs' attorneys still try to add a certain term - that upon default of a payment, judgment shall enter for an amount significantly higher than the balance due - despite the likelihood of it being invalidated as an unenforceable penalty. Many attorneys find it helpful to come to mediation with a prepared draft of a memorandum of understanding or settlement agreement on their laptop computer.