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COLUMN

Pre-litigation mediation: strategies for success

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In my mediation practice, I am struck by the increasing number of cases being brought to mediation before a lawsuit has been filed or immediately after a complaint is filed. Such "pre-litigation" mediations find their way to my desk before anything else connected with the case – discovery, motions, settlement discussions – has happened.

What accounts for the surprising rise in pre-litigation proceedings, and how does a mediator navigate the unique challenges they pose? Many attorneys believe they know what is prompting the other parties to mediate prior to litigation. These attorneys will frequently show up to a mediation and tell me that the other side begged to mediate because their case was extremely weak or because they wanted to settle a nuisance case for pocket change. The mediator's first job in such cases might be to disabuse counsel on both sides of any such notions.

REASONS FOR PRE-LITIGATION MEDIATION

Desperation and fear are rarely the reasons parties choose to pursue pre-litigation mediation. Most pre-litigation mediations are, in fact, driven by a simple desire by the defense to manage risk. Defendants are often interested in seeing if resolution can occur based on their own evaluation of risk. They understand that if they can resolve a case before it goes to trial, they will not only limit their own attorney fees but also attorney fees incurred by the plaintiff, for which they might ultimately bear responsibility.

Another factor driving pre-litigation mediations is parties' desire to get a better understanding of their case without engaging in costly formal discovery. If they can resolve a case without invest-ing the time and money needed for pretrial discovery, they may very well come out ahead. Pre-litigation mediation can also be a vehicle for controlling exposure for high-profile, high-publicity cases.

And though not common, plaintiff's counsel will sometimes push for early mediation to bring in quick revenue without having to actually litigate a case. Defendant's counsel, in contrast, may see pre-litigation mediation as an opportunity to avoid a potentially bad outcome at trial.

PREPARING FOR PRE-LITIGATION MEDIATION

Once the mediator has waded through misconceptions on both sides about why the parties are at the pre-litigation session, he or she can build a tool kit that will help the parties work toward consensus. This requires an understanding of the parties' perspectives, which can help to identify and address any blind spots concerning the case. With help and support from counsel, the mediator can then steer the parties toward a mutually satisfactory resolution of their dispute.

It starts with good preparation. Counsel on both sides should share their briefs, along with their demands, with each other prior to the mediation. I always hold a pre-mediation phone call so I can suggest what will help each side come to a resolution. Litigators have traditionally been trained to hide the ball as long as possible, but there is tremendous value in sharing information early in the process. When I worked as a litigator, I consistently shared my briefs with the other side, even when they refused to reciprocate. It shows confidence in the case and educates the other party as to the strengths of your case, allowing them to put an appropriate value on it.

If they are concerned about revealing certain information, counsel can prepare a second brief, for the mediator's eyes only, that addresses anything they want to hold back for cross examination or other purposes. If plaintiff's counsel is hoping to achieve a large settlement, or defense counsel is in possession of evidence that minimizes the plaintiff's claim, there is really no downside to putting the information out there. Unless the briefs are shared between the parties, the mediator is left going between rooms with vague assertions, and every conversation starts with "if the facts turns out to be true." That just forces the attorneys to hold back and revert to litigation tactics to confirm the alleged facts.

DEMANDS, TESTIMONY AND OTHER CONSIDERATIONS

The plaintiff should always make a demand before the mediation commences. A decision maker in the defense room is typically vested with some amount of authority, but if that individual is kept in the dark regarding what the plaintiff is seeking, he or she may not be able to respond to a demand at mediation. Plaintiff's counsel may expect the defense to come into the mediation with full authority, but what does that mean? Unless there is an agreed upon definition or value given to "full authority," there may be a huge divide between the parties' positions; plaintiff's counsel could argue that if they present their demand at the outset, the defendant will not agree to mediation. It just confirms that the parties are not seriously there to resolve the matter.

A key element in resolving the matter for both sides will be witness testimony. Nothing is more powerful than a good fact witness. Witness statements are even better. But even without written statements, having a fact witness who is willing to talk with a mediator can be a powerful tool in the mediation process. A plaintiff may not have reported

offensive conduct in writing at the time of an incident, but he or she may have a contemporaneous communication with a friend that can lend credibility to the allegation of wrongful conduct. Counsel should try to develop that evidence before the mediation.

If a defendant has financial issues that will limit its ability to pay a settlement, that must be communicated at the beginning of the mediation. Some defendants pursue early mediation because they cannot afford to pay for litigation. Nothing will destroy a mediation faster than spending a day negotiating a settlement agreement, only to learn at the eleventh hour that the defendant is resource-constrained and will have to make payments for 30 years. The defendant should put this information on the table at the outset, providing reliable evidence to plaintiff's counsel to enable them to evaluate the defendant's financial viability. This does not mean creating a last-minute P & L statement on Quicken an hour before the mediation; it means coming to the mediation armed with check registers, tax returns, tax liens or CPA notes.

Finally, if either party has any unusual terms that must be included in a settlement agreement, these should be addressed either before the mediation commences or at the very start, rather than at the end. The mediator can then help the parties negotiate those terms at the outset of the mediation.

CONCLUSION

Pre-litigation mediation is a far different animal than mediation conducted after parties have traversed the path toward litigation. Given the very early stage of the proceedings, as well as the relative lack of knowledge on both sides, the best approach when seeking resolution prior to litigation is for all parties to be open with their information.

Parties and counsel will benefit most when they share important facts and remain flexible in their dealings with each other. When counsel works with the mediator to keep the information flowing and follows the rules as much as possible, pre-litigation mediation has a high probability of being both productive and successful.