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Before the Beginning: Conversations With Your Mediator

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Work done in advance of a mediation is often critical to its success. One-on-one pre-mediation discussions with your mediator provide her with information that can contribute significantly to her effectiveness. These discussions will also help her to get the mediation moving quickly once it begins, saving time and money. Often, attorneys spend time preparing for the first mediation session—writing a mediation statement or memorandum, reviewing the facts and law, developing an opening statement and preparing their clients—but neglect to educate and interact sufficiently with their mediator this early in the process.

The purpose of this article is to provide a review of the types of attorney-mediator interactions that should take place prior to the first mediation session in order for the process to work most effectively. Advocates who make time to have telephone sessions—or even meetings, if convenient—with their mediator in advance of the first mediation session maximize the chances for settlement and tend to shorten the process once the mediation session begins.

Written Statements

Mediation statements, or mediation memoranda, should include a great deal of information. In addition to a description of the relevant facts and case law, mediation statements should provide the mediator with a history of the settlement discussions, if any. This will give the mediator some idea of an appropriate starting point for the facilitated negotiation that she will help the parties to conduct.

If counsel do not even agree on what has transpired in past negotiations, this, too, is important information for the mediator to have. She should know the extent of the disagreements between the attorneys in order to understand how to approach the attorneys and where the mediation needs to begin.

Prior to the first mediation session, the mediator should have as much information as possible about the nature and quality of the interactions of all of the people who will be participating in the mediation. Describing for the mediator, in detail, the interactions you have had with your adversary is essential to her understanding of how she needs to approach each of you in advance of and during the mediation. Similarly, the mediator needs to have detailed information about the parties' interactions with each other prior to the dispute, during the events leading up to the dispute, and after the initiation of legal proceedings. Any interactions that may have occurred between your client and your adversary are also

important for the mediator to know about. Additionally, the mediator should be provided with information about any players who, although not attending the mediation, may play a behind-the-scenes role in decision-making.

Oral Communications

But written presentations are only one of the methods that should be employed. Advocates may decide, for reasons of efficiency or reluctance to memorialize sensitive impressions, not to include all of this information in their mediation statements; some of this information can and should be presented orally. Since clients typically read mediation statements, these memoranda may not be an appropriate place to discuss personalities and relationships between counsel or between the parties (and, in particular, between an attorney and his client). Pre-mediation oral conversations provide an opportunity to discuss critically important observations about these issues.

In particular, attorneys will not want to describe, in writing, their clients' personality quirks or difficulties counsel may have with his client. Yet it is important for the mediator to understand, as fully as possible, the client's personality and the attorney-client dynamics. Knowing something about the party's personality and issues of particular concern to the party will help the mediator understand the potential obstacles that the client's attitude or behavior might pose to resolution of the dispute.

Additionally, information about the party and his relationship with counsel will help the mediator understand how much influence the attorney has over his client. This, in turn, helps the mediator develop the most effective approach in working alongside counsel to help the party move toward resolution.

An attorney's pre-session conversations with the mediator also allow the attorney to educate the mediator about the party's level of business and legal sophistication. This is critical information for the mediator to have in order to communicate effectively with the party and to take the steps necessary to make the party feel comfortable with the process.

The mediator's discussions with counsel about the personality traits of his client and other players at the mediation have the additional benefit of helping the mediator learn something about counsel's attitude and personality. This, in turn, gives the mediator some insight into obstacles counsel might present to achieving resolution and how to circumvent any such obstacles.

In some cases, it may be helpful to include the party in at least one pre-mediation conversation between counsel and the mediator. For instance, a direct mediator/counsel/party pre-mediation conversation can be useful in cases where the party has little or no experience with the mediation process. A conversation with the mediator can educate the party about the mediation process and help the party to become comfortable with the mediator. This contact can aid the party in understanding and embracing the idea of a facilitated negotiation.

Telephone Conferences

Advocates should also take advantage of the mediator's time during a pre-mediation telephone conference to strategize with her about the best way to approach the other side. After reading counsel's mediation statement, the mediator may have valuable insights into the strengths and weaknesses of counsel's case and can help him develop the most effective formulations of his arguments.

Equally if not more important, the mediator can help the advocate think about the right note to strike in the

usually critically-important opening statement. After all, this is the advocate's opportunity to speak directly to the party on the other side of the table and to convey his arguments to that party, unfiltered through the party's attorney. Crafting the opening statement can require a delicate balancing of the competing needs to (a) articulate one's client's case as persuasively as possible, and (b) refrain from antagonizing the party on the other side to such a degree that he will find it difficult to summon the good will necessary to negotiate.

Additionally, pre-session telephone or in-person contact is counsel's opportunity to develop a relationship with the mediator. This is the person on whom he is going to rely to bridge the differences between the sides. A sense of trust and, at the very least, good communication between the attorney and the mediator will enhance the attorney's chances of having the mediator effectively present his arguments when the mediator is in private caucus with the other side.

Pre-session oral communication will also give the mediator an opportunity to remind counsel that part of her role at the mediation is to be an advocate for the process and that this role involves playing "devil's advocate" with each side during private caucus, articulating to each side the arguments advanced by the other side. The mediator may also remind counsel that these pre-session telephone conferences, like private caucuses, are part of the mediation and that confidentiality obligations apply.

Pre-mediation discussions with the mediator are also an opportunity to discuss logistics such as the time and place of the mediation, whom counsel expects to have speak at the opening joint session, and ambience issues such as size of the room, temperature controls in the room, access for the disabled, where necessary, and—last but not least—what arrangements will be made for lunch and any other meals or snacks that may be required during the mediation session. (It may sound like a small matter but empty stomachs make for cranky people—usually a recipe for disaster in a mediation.)

In sum, there is much work to be done before the first mediation session begins. Advocates can enhance the mediation's chances of success by advancing the ball in their pre-mediation interactions with their mediator.

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