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PERSPECTIVE

# Take 5

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Litigation can be expen sive, time consuming and stress inducing. COVID-19 restrictions are exacerbating these conditions. Mediation is an alternative that empowers litigants, counsel and insurance professionals to minimize risks, expand options and optimize outcomes. Rather than relying on the opinions and biases of judges and jurors, prepared mediation participants gain the opportunity to control and shape the resolution of their dispute.

Here are five key steps to a productive and successful mediation.

## 1. Know Your Case

Counsel should develop a solid understanding of the dispute's pertinent facts and issues well in advance of mediation. A judicially appointed referee or special master can assist the parties in streamlining the production of necessary information.

**Verify the client's role** in the dispute. An attorney's credibility may be damaged if his opponent produces evidence at mediation that counters his position on key information. If there is a written contract, counsel should confirm that it accurately reflects his client's work. The subcontractor who placed drywall throughout a condominium project has very different exposure than the drywaller who installed leaking windows as a favor to the general contractor. Similarly, the surprise discovery of a client's secret marriage during mediation may negatively impact negotiations for support payments in a domestic partnership dispute.

**Analyze key evidence**. As is always the case, counsel should be familiar with all relevant key evidence. In a personal injury case, this includes reviewing the medical records of the treating physicians to confirm that the client had no related prior injuries and his doctors' diagnoses line up. Are there significant medical liens? Will an independent medical examination advance settlement discussions? In commercial disputes, counsel should review contract documents and analyze the impact of indemnity, attorney fees, force majeure, insurance requirements and other relevant clauses. After analyzing the evidence, counsel should include pertinent documents in the mediation brief.

**Avoid the "empty chair"** at mediation by involving necessary parties in the negotiations. Otherwise, a participant may point to an absent party as the one who should be paying the freight, or at least paying a significant share, to lessen his own contribution. Along this line, counsel should evaluate the viability of the parties. Do they have adequate resources to contribute towards a settlement, pursue a claim all the way to trial or pay a judgment?

**Understand the insurance picture.** If a lawsuit involves covered claims, counsel should request applicable insurance information and identify the defending carriers. CCP Section 2017.210. It is not unusual for a single carrier to defend multiple parties in a complex case, a scenario that may impact settlement dynamics. Once the relevant records are gathered, counsel can analyze potential coverage issues. Large disputes frequently involve time on risk disagreements, exhaustion questions, self-insured retention, consent provisions and other issues that directly impact negotiations. To prepare for such complications, the parties may consider retaining coverage counsel when the stakes are high or insurance coverage is uncertain. Counsel may not resolve the myriad of insurance issues before mediation. However, having identified the issues and engaged the decision-makers, the parties can factor this information into case value determinations and settlement strategies.

## 2. Prepare Your Client

Counsel should meet with their clients before mediation to understand goals, define options and explain the mediation process.

**What does your client want?** While the aim of most mediations is to negotiate funds, clients may have additional goals. Often, these goals are related to the negotiation timeline. For instance, there may be advantages to timing the resolution around a particular event. Perhaps the client is hoping to pursue a lucrative business opportunity but can only do so if the dispute is resolved by a certain date. In some cases, a ruling on a pending motion or trial in a separate lawsuit can strengthen or diminish a client's position. Is there an ongoing personal or business relationship that the parties want to preserve with a fast resolution? Other goals may include emotional recognition through an oral or written apology, a published retraction or even a commemorative plaque. Counsel should continue to discuss objectives with their clients as the case proceeds. Mounting costs, other commitments and the stress of litigation may moderate even the most aggressive or irate client's goals.

**What are the best alternatives to a negotiated agreement?** Settlement allows the parties to minimize risks, generate creative solutions and maintain control over the outcome of the dispute. To develop a road map for effective negotiations, parties should explore alternatives to a brokered deal. What happens if the case does not settle? Will the participants name new parties, vigorously conduct discovery, file dispositive motions, pursue a published court decision or try to engage other influencers in the dialogue? Rather than ending a dispute, will a verdict likely result in post-trial motions and lengthy appeals? Will the victor be able to collect on a judgment or recoup any costs? Also, the parties should consider their opponent's goals and their options if the dispute does not settle. Participants can gain a good understanding of settlement value by defining and analyzing alternatives to a mediated resolution.

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**Explain the mediation process.** While most lawyers have participated in mediation, clients may be unfamiliar with the process. Counsel should discuss statutory and contractual confidentiality protections applicable to the negotiations. In California, all written and oral communications made for the purpose of mediation are confidential and inadmissible in any judicial proceeding, including statements that may be relevant to any potential malpractice claim. Except in representative actions, counsel must obtain the client's signed acknowledgement that "he or she has read and understands the confidentiality restrictions." Evid. Code Sections 1119(c), 1129. See also *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011).

Traditionally, mediations begin with a joint session in which the mediator introduces the participants and discusses the rules and any agreements concerning the mediation. The parties may also give opening statements in the joint session; if so, counsel should manage client expectations by explaining, in advance, that each side will present its best case scenario, aggressively focusing on strengths and minimizing any weaknesses. Today, many parties opt out of giving opening statements to avoid the possibility of igniting emotions, further alienating the parties and complicating settlement efforts; others see them as a golden opportunity for counsel or the client to directly connect with decision-makers. After the opening session, the mediator usually moves the parties into separate rooms to privately explore settlement opportunities. The mediator may bring the parties and/or the attorneys together again for further joint negotiations or to finalize any settlement agreement.

**Consider in person and remote mediation options.** In person meetings allow participants to interact informally, read body language, look each other directly in the eye, express empathy with a pat on the back and seal a settlement with a handshake. A decision-maker who invests the time, money and energy to travel to a distant mediation often gains credibility and demonstrates that she is serious about trying to reach a deal. While virtual sessions are not perfect substitutes for in person sessions, there are benefits to this technology. Virtual meetings significantly reduce travel costs and time commitments and make it easier to schedule meetings. Participants can simultaneously see each other's reactions onscreen. As the speed and quality of videoconferences continue to improve, and people become more comfortable with the technology, virtual sessions will continue to grow in popularity. In April 2020, Zoom reported 300 million daily users. High-emotion cases, such as wrongful death and medical malpractice cases, may be especially challenging to negotiate remotely. Business and commercial cases may be more suitable for remote resolution.

### 3. Engage the Mediator

The mediator's initial call with all counsel is an opportunity for the parties to establish **straightforward** objectives and advance a clear and cost-efficient resolution strategy. Counsel may agree to a **streamlined** production of information needed for meaningful negotiations. The process may include an agreement to deposit all relevant information at a single location, stipulate to the production of confidential documents, prioritize depositions directly relevant to negotiation points or exchange verified declarations regarding privileged financial matters.

Follow up, **strategic** one-on-one conferences with the mediator allow the participants to privately discuss their goals, address obstacles and explore resources in preparation for a productive mediation. Counsel often raise concerns about unrealistic client expectations, highlight the potential impact of a personal message or apology, flag emotional triggers or identify insurance or funding problems. The mediator works with counsel to implement an approach to address these issues, avoid emotional outbursts and pave a path to productive talks at mediation. For example, in a recent construction defect case, the parties initially agreed to focus on the production of key documents. In individual strategy sessions, they identified and tested the impact of insurance coverage issues. Realizing that they faced likely bankruptcy if the dispute progressed to trial, the defense arrived at mediation prepared to explore creative resolutions. They ultimately agreed to form an LLC to buy back, repair and then re-sell the damaged home. The homeowners, having already found a home in the same neighborhood, accepted the proposal contingent on applying the funds from the sale of their current home to the purchase of the new home. The case settled at the one-day mediation. Escrow simultaneously closed on the purchase and sale of the two homes three months later, and the parties filed dismissals with prejudice the following day.

### 4. Simplify Complexities

**To streamline resolution of complex cases, confer with your experts regarding key issues before mediation.** The right experts will clarify claims, defenses and risks, encourage creativity and expand resolution options in disputes involving technical, scientific or other complex issues. Evidence prepared by expert consultants for mediation, including photographs, videos, written witness statements and recorded analyses of raw data, is confidential in California.

**Determine the role of experts in the mediation process.** Before mediation, parties may agree to allow their experts to share opinions. Fairly candid expert exchanges frequently occur under the mediation privilege and before any formal expert disclosures and depositions. In construction cases, experts often explore different repair options to bridge the gap in settlement positions. In some cases, parties jointly retain a neutral expert. An objective, reliable appraisal may be the catalyst to close a real property dispute, a respected professor's geotechnical review may break the logjam as to the source of extensive cracks throughout a shopping center or a jointly retained financial expert may untangle complicated financial arrangements. Alternatively, parties may opt to share their individual expert reports with the mediator. Expert summaries of treating physicians' reports in medical product cases are tremendously helpful in preparing for meaningful negotiations. At mediation, expert presentations highlight the strength and weakness of the parties' positions, generate creative options and provide a preview of the experts' effectiveness at trial. Decision-makers who previously dismissed legal theories, may sit up and pay attention to an objective, scientific explanation of events. Areas of agreement may be clarified and areas of disagreement narrowed. The parties may realize that the jury likely will not grasp important technical nuances and, instead, may decide a case based on personal bias or incorrect assumptions rather than sound science. Any of these scenarios can generate productive settlement discussions.

### 5. Develop a Strategy

Parties should develop a settlement strategy as far in advance of a mediation as possible.

**Determine the best timing for service of the initial settlement demand or offer.** In cases involving insured business claims, a demand should be served four to six weeks in advance of the mediation to allow counsel sufficient time to obtain appropriate authority from their client or insurance carrier. On the other hand, in an emotionally charged personal injury or wrongful death case, counsel may decide to withhold a demand or offer until the parties have an opportunity to share their stories with the mediator.

**Consider the structure of a potential agreement and how it will impact your settlement strategy.** In a multiparty case, plaintiff may be set on a global agreement or may consider settling with a particular individual or around a "problem" player. Recalcitrant parties may be more interested in brokering a settlement if they see other defense parties exiting the case; in complex litigation, no one wants to be the cheese that stands alone at trial.

**Confirm that decision-makers will attend with settlement authority.** Ideally, all representatives and insurance professionals at the mediation have sufficient authority to approve a deal. Before mediation, parties should consider and address additional issues that may impact their ability to finalize an agreement. For example, if any key player is bankrupt, suspended or a juve-

nile, parties should take the necessary legal steps to address the situation and secure authority to close a deal. Perhaps a third party's consent is needed to finalize an agreement. In a recent case, a neighbor had to give the parties access to her property for them to perform building repairs that were the key to resolution of the dispute.

**Be proactive.** Rather than merely reacting to an opponents' offers or demands, participants should privately define the outcome they hope to achieve and outline a basic negotiation strategy. A party might consider starting with a settlement demand or offer backed up by an explanation of damages and then make moderate, measured moves until her opponent reaches a certain threshold. Alternatively, she might begin with aggressive moves and then signal her end point with smaller and smaller steps. A party may plan to propose a settlement bracket if the parties are not within a particular range after three or four exchanges. Some negotiators like to focus on the midpoint of offers and demands, messaging their final target number while formally communicating a number that preserves negotiating room.

**Consider potential settlement terms** in advance of mediation. Counsel should analyze the possible legal and practical impact of clauses they would like included in the final agreement, such as mutual release, confidentiality, non-disparagement, payment security or arbitration provisions. In lieu of a strictly cash settlement, a draft may identify other types of compensation, such as complimentary services, an apology, write off of money owed or a resignation letter. If a settlement is reached at mediation, the party who attends with a proposed agreement in hand can provide the structure for closing discussions, finalize the document and efficiently close the deal at mediation.

**In sum, be prepared.** Take five key steps in advance of mediation for productive and successful negotiations. Know your case. Prepare your client. Engage the mediator. Simplify complexities. Develop a settlement strategy. Counsel who follow these guidelines bring significant value to mediation and ultimately minimize risks, expand options and optimize the resolution of their clients' civil disputes. ■