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Preparing for Appellate Mediation¹

Preparation is the key to success in mediation, no less than in litigation. This paper suggests matters that parties and counsel may wish to consider before, during, and after mediation. These suggestions are offered by the Mediation Program Coordinator and do not necessarily reflect the views of the court.

Before Mediation

Explain the mediation process.

Discuss with your client the differences between litigation and mediation, and the roles of the parties, counsel, the mediator, and any other participant in the mediation process. While most mediators open the mediation session by giving the participants a “road map” of anticipated procedures, your discussion before the mediation can put the client at ease with the process. A good starting point is a definition of mediation:

Mediation is an informal, confidential process in which a neutral party (the mediator) assists the parties in understanding their own interests, the interests of the other parties, and the practical and legal realities they all face. The mediator helps the parties explore options and arrive at a mutually acceptable resolution of the dispute.²

Help your client understand the client's interests.³

A successful mediation resolves a dispute by finding a solution that best meets the parties' individual and joint interests. If you broaden your discussions with your client beyond the legal issues and the *position* the client wishes to take to include the client's underlying *interests*, you increase the probability of a satisfactory result. Many clients initially focus on positions, e.g., “He should pay for the money I lost when he breached our agreement,” rather than interests. One of the client's interests may be monetary, but there may be other interests of equal or greater value, like maintaining a favorable personal, employment, or business relationship or ending litigation so the client can get on with his or her life or business. The client's interests should be prioritized.

Help your client understand the other parties' interests.

Other parties also have interests underlying their positions. Those interests may be the same as your client's, e.g., maintaining or improving an ongoing relationship or saving time and money. Even if the other parties' interests differ from your client's, they may not be conflicting. Put your client in the other parties' shoes and try to understand their interests. Prepare questions to ask the other parties to bring out those interests.

¹ Adapted with permission from Court of Appeal, First Appellate District, *Preparing for Appellate Mediation*. The suggestions contained in this document are offered by the mediation training designers and do not necessarily reflect the views of the court.

² Adapted from Gary Friedman, Esq., Center for Mediation in Law, Mill Valley, California (1998).

³ Interests include a party's goals and needs.

Explore options for resolving the dispute.

Once there is an understanding of everyone's interests, explore possible resolutions that will meet those interests. Instead of focusing solely on money, explore with your client creative ways to expand the pie. For example, if it is in the parties' mutual interest to preserve a good business relationship, the respondent may be willing to accept less than the trial judgment for more favorable contract terms. Options should be tested against practical and legal realities. Does a possible resolution meet the interests of the parties? Will a proposed resolution hold up?

Effective preparation also requires thorough discussion of the client's alternative to settlement and the risks involved. What is the likelihood that a judgment will withstand appellate review? What legal and practical problems do you anticipate on appeal? What will it cost in time and money? Often a party that prevails on appeal merely wins an opportunity to return to the trial court and face more expense and delay.

During Mediation

The mediator is likely to follow a similar process that you use in preparing the client: discussing the parties' understanding of the dispute, their interests, and possible resolutions.

Make sure that all decision-makers participate.

Often persons other than the client may have interests that must be considered in the resolution of the dispute. That person may be a spouse, an insurance representative, or a company manager, for example. Mediation is unlikely to be successful without the participation of all persons with authority to resolve the dispute.

Get the client's story out.

After the mediator discusses the process, the parties and their attorneys normally are asked to state their understanding of the dispute to each other and to the mediator. This may be the parties' first opportunity to discuss the dispute directly with one another. While your legal expertise enables you to address legal issues and arguments most effectively, often your client is best able to discuss the history of the dispute and the interests that must be met by an agreement.

Listen.

Careful listening to the discussion of the dispute by the participants usually will bring understanding of the parties' interests and suggest options for resolution. Stress to your client that understanding the other side does not necessarily mean agreement.

Focus on problem solving.

Unlike litigation or arbitration, mediation is designed to be a collaborative process. The parties, with the assistance of the mediator, work together to resolve their dispute in a way that will best meet their mutual interests. Keep this objective in mind when confronting obstacles to resolution that may arise during the course of the mediation.

After Mediation

Finalize any agreement.

If an agreement, in whole or in part, is reached at the mediation, the mediator or counsel may write down the key points for formal drafting after the session. Be sure that any formal document accurately reflects the agreements reached at mediation and that the document is executed in a timely manner before memories fade or minds change.

File an abandonment of the appeal.

When the case is settled, the appellant should file an abandonment of the appeal. The mediator can provide a simple form for this purpose. See CRC 8.244(b).