Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

DISCOVERY PLAN PART 3--Are You Ready for Mediation?

By Katherine Gallo

In many cases mediation is the most cost-efficient and effective method of resolving a case. Often, litigants can save a lot of money and time when mediation is held after first tier discovery has been completed, once the core facts are determined that circumscribe the dispute. In order to facilitate early resolution many California courts have implemented mediation programs and asked mediators to volunteer their time. Unfortunately, many mediators are becoming discouraged with these programs because many times the parties are not prepared.

Speaking to a number of Bay Area mediators who participate in the court ordered mediation panels, they have uniformly identified that the majority of the court ordered mediation cases are breach of contract and personal injury cases.

It was a consensus that, whether the information is obtained through investigation, informal exchange of information or formal discovery, parties need to know the absolute basics of their case so that they can intelligently mediate. Mediation is not the time to expect an opponent to "educate" you of the basic understanding of your case. This may seem to be obvious, but in hearing the stories from the mediators it was surprising on how unprepared many parties are.

In my opinion, a proper evaluation of the case is the single critical factor to a successful mediation. The proper evaluation is based on the stage of the case. With early mediation, there will be less certainty regarding the evaluation of the case (a wider range of unknowns). The flip side, however, is that with greater certainty through discovery comes added costs of the discovery itself. However, in most breach of contract and personal injury cases, experienced litigators (and clients for that matter that have experience in settling sometimes thousands of cases) can calculate a rough settlement range at any stage of the case based on the known facts, the law, and the expected costs moving forward.

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 e-mail: klgallo@discoveryreferee.com
Discovery Blog: www.resolvingdiscoverydisputes.com

Also, to properly prepare for mediation in the *non-typical cases*, preparation requires understanding the possible outcomes, if the case is not a simple "*how much*". Preparation must be done to determine whether the dispute is, for example over the probability of winning title to property in a quiet title action (where winner takes all). Or, can the dispute between the litigants be resolved by agreeing to injunctive relief, or by one party agreeing to do work as part of the resolution. Understanding, planning for, and evaluating the settlement paradigm or possibilities must be thought through **BEFORE** the mediation begins, or you may find yourself evaluating them for the first time in front of the mediator, the opposing counsel and your client.

Below are suggestions from the mediators on how to prepare for mediation:

PRIOR TO SCHEDULING MEDIATION

- Research the causes and of action and establish what you need (if you are a plaintiff, or your opponent needs if you are a defendant) to prove you case. Review jury instructions. Determine whether or not any statutes or case law are relevant or even dispositive to the case.
- Is this a case that can be positioned for a dispositive motion such as a motion for summary judgment or judgment on the pleadings? What are the odds of success? Is it wise to file the motion prior to the mediation, so that the possible outcome can influence your opponent's evaluation and view of the case?
- Are there any legal issues that need to be resolved before you can properly evaluate your case? Many cases have a significant litigation risk, where a judge's ruling can dramatically change the evaluation, such as the duty to defend in an insurance case, or design immunity in a dangerous condition of public property case.
- Are there any insurance issues that need to be determined prior to mediation? Have all the defendants' insurers been tendered to, have all responded, and are there any that refuse to participate?

BREACH OF CONTRACT CASES

- Do you have a copy of the executed contract and all modifications of the contract?
- Have you read the contract and talked to your client about the terms that are at issue in the case?
- Is there a dispute as to any oral understanding or circumstances of the contract that would lead you to depose opposing parties or witnesses regarding the critical issues (contract formation, alleged breach or consequential damages, for example) prior to the mediation?
- Is there uncertainty in the claims such that you need an accounting of the damages prior

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to the mediation?
- Are there any terms of the contract, or your proof, that would lead to contradictory results that need to be considered prior to mediation? For example, in an insurance case where one party is seeking reformation of the contract, have you considered that without reformation, your client legally loses the case?
- Is there a settlement construct that resolves the dispute but requires action on the part of one of the parties rather than a simple exchange of money?

PERSONAL INJURY CASES:

- Have you considered and evaluated the appropriate percentage of comparative negligence?
- Do you have all the medical records and medical bills? Have any of the medical bills been reduced or compromised?
- Is there any "joint and several" liability issues, or Civ. Code §1430 - 1432 (Proposition 51) issues to consider – how does that affect your strategy.
- Are there any liens?
- Do any medical records show pre-existing injuries?

INVESTIGATION and DISCOVERY

- First, determine what information you need to evaluate the case in order for you to advise your client of the range of exposure (or potential recovery) and outcome of the case.
- Consider, will the information you are obtaining likely to sway the mediator (or judge or jury) to your position or convince the other side that they need to resolve the case?
- Determine what information you can get from investigation and what need to get from formal discovery.
- Specifically obtain:
    1. Initial written discovery to obtain information and documents.
    2. All medical records showing pre-existing injuries.
    3. Depositions of all major players especially if is a credibility match, i.e., a "He said/She said" situation.
    4. All photographs from that day of the incident if applicable.
- Personally go to the scene of the accident to understand how the accident could have occurred
- Prepare post-incident photographs or diagrams of the scene of the incident.
- Determine if you need to conduct an IME, site inspection or destructive testing prior to the mediation

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BRIEFS

- Provide the brief at a minimum five (5) days before the mediation so that the mediators will have time to review the brief, conduct any legal research they may need and possibly do a pre-mediation conference call.
- Prepare your brief as you would prepare your motion papers to the court. You need to convince the mediator to your side as you would a judge or jury, so the mediator can work for you with the other side. If you have exhibits, then highlight the relevant portions.
- Depending on the type of case you have, your brief should contain the following
    1. Timeline of events.
    2. A statement regarding liability: Whether you are admitting liability or comparative negligence for the purpose of the mediation.
    3. Relevant legal authority, including important legal issues and where they are likely to be raised: Motion for Summary Judgment, Directed Verdict or Motion in limine.
    4. Calculation and Total of all damages and offsets for both sides (if applicable), and the net payments from one side to the other.
- Depending on the type of case you have your exhibits should include the following:
    1. Color Copies of all photographs.
    2. Highlights of pertinent deposition testimony and statements.
    3. Highlights of all pertinent information in the police report, medical records, employment records, contracts, etc.
    4. Diagrams and photos of accident scene (especially auto accidents).
    5. Google maps if relevant.
    6. Any expert report you are relying on. This is not an all-inclusive list, but it is a starting point. I welcome others to provide their input and suggestions.

HINT: One retired judge who is now a prominent mediator in the Bay Area says that the first thing you must do is meet with your client and "***really listen to what he or she has to say***."

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