PREPARING THE CLIENT
FOR MEDIATION AND SETTLEMENT CONFERENCE

By

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A. Introduction –

As a mediator and judge *pro tem* , as well as a participant in settlement conferences and mediations, I have seen many resolutions threatened by the failure to prepare clients for the process. Clients need to understand the process, the roles of the participants and the purpose of the process. The goal of this article is to help prepare clients for the meditation so they will understand and thus be able to meaningfully participate in the process.

B. Prepare Yourself to Prepare the Client

In order to prepare the client, you the attorney need to be sure that you are prepared for the process. This means understanding the case from both sides. You must know which facts are not disputed, and those that are. Among those facts, which are essential to the case and which are merely anecdotal or incidental. Many times the lawyers have not parsed out which facts are necessary to prove each element of each cause of action that has been alleged. If you think of the jury instructions you would request in the case, those would set forth the elements of each claim or defense. Then you understand where your case is factually and legally strong, and where it is not.

Next you need to understand the damage picture. Do you have, and have you disclosed, the information necessary to prove the damages, or support the relief you are seeking? Do you have the information necessary to disprove or cast doubt on the size or severity of the relief sought if you are defending? You can't formulate a plan or goal for the settlement process if you don't know what you reasonably hope to achieve if the matter proceeds through the litigation process.

You need to understand what other, similar cases have settled for or comparable jury verdicts have been. As will be discussed below, this is one of the best ways of managing client expectations.

Now that you understand the case thoroughly, prepare yourself to discuss with the client what happens if the case does not settle. The options typically are few: go to trial (in one form or another such as binding arbitration , short trial or summary jury trial) or walk away from the case. If your client is the defendant, generally the option is one: go to trial.

If you go to trial, what is a reasonable range of verdicts as a result of your experience and research. Certainly there are those cases in which an extraordinary result

has been achieved, but what is the range you can reasonably expect? Additionally, you need to factor in the cost of trial as one of the risks of not settling the matter. As the claimant, you also want to factor in how long it might take to actually have possession of the relief, whatever or however much it may be. Certainly one may hope to better an offer to settle, but if one has to wait a significant time to achieve that result, it is worth less than an immediate settlement.

C. Prepare the Client

You and the client must be prepared to work as a team. The settlement judge or mediator will often address questions or comments directly to the client. You do not want your client taken by surprise or be unprepared to respond to the questions or comments from the mediator.

First, the client must understand the process. Whether a private mediation or a judicial settlement conference, the mechanics of the process are similar. Generally there is a joint meeting with all the parties, followed by private caucuses in which the mediator shuttles between the groups. Next, the client must understand the purpose of the mediator. The mediator is there to help the parties reach an agreement. She is there to "uncomplicate" things. She is not there as a judge. She does not favor one side over the other and she is not there to determine "right" and "wrong." Typically the mediator will feel free to share whatever she learns from one party with any other party, unless specifically asked to keep something confidential. When requested, the mediator will almost always respect that request.

Another important factor for the client to understand is the confidentiality of the entire process. In Arizona, there are at least three distinct sources for that confidentiality. Rule 16.1 (e), Arizona Rules of Civil Procedure, requires that the court order confidentiality in settlement conferences. A.R.S. § 12-2238, which is located in the "Privileged Communications" portion of the "Courts and Civil Proceedings" section of the Arizona Revised Statutes, states that "the mediation process is confidential." Finally, Rule 408 of both the Federal and State Rules of Evidence provides that evidence of offers to compromise and statements made in connection with those offers are not admissible. It is imperative that clients understand that they are not weakening their litigation positions by participating fully in the settlement process. The client needs to understand that compromises made in the mediation won't come back to haunt them if the case proceeds to trial.

The client must understand that the law seeks to view the facts in an objective sense and seeks to determine what is "relevant" from a legal point of view. Facts that strike the client as compelling and potentially case dispositive may be legally irrelevant. Further, things that the client "knows" about the adversary and to the client demonstrate why the adversary may be "no good" may not be admissible at all. A good guide to relevance may be the instructions of law that may be given in a case to a jury. Certainly the Revised Arizona Jury Instructions (RAJI 3d) provide some helpful direction. As an

example, jurors are instructed not to be influenced by "sympathy or prejudice"; not to "speculate or guess" and to decide the case "only on the evidence produced in court." The RAJIs are likely to contain the elements of the claim or defense applicable to your client. Going through these elements will help focus the client on the relevant facts and on what evidence is or is not likely to be admissible.

The client must also be prepared to understand what the law can or cannot give him. Legal remedies are limited and are generally limited to money in civil cases. The law will not impose a duty on a party to apologize, for example, but that remedy is available by settlement.. A party may believe that other remedies should be fairly imposed and not understand that the court cannot give them such a remedy. You and the client need to understand the remedy the client hopes to achieve and to determine if that result is available both through litigation and settlement, or if the desired result is achievable only through settlement. Similarly, the client should understand what alternative objective might obtain a similar result.

The facts in the possession of the adversary also need to be discussed. You certainly don't want your client learning for the first time from the adversary or the mediator some damaging fact that you haven't shared with the client. Revelations like that tend to have a polarizing effect and may reduce the confidence your client has in your representation. Further, make sure the other side has all the information in your possession. You want the other side to come as prepared as you are. If you have neglected to provide the other side with all the information it needs to fairly evaluate the claim or defense, you can't expect the other side to understand or agree with your positions.

Often the client does not understand how long it might take to realize compensation even if the client prevails in court. Depending on where in the litigation the mediation occurs, literally years can be saved by settlement. A discussion of the many things that must occur even after a jury verdict in order for the client to see some compensation is useful. The notions of post-verdict motions, arguments over forms of judgments, post-judgment relief petitions and appeals should be discussed. Of course, the worst result is a verdict that goes up on appeal and is reversed and must be retried. Further, the failure to settle can bring in risks of collectablility of judgments, such as bankruptcy.

Make sure the client understands what has gone on prior to the mediation in terms of negotiations, and that you both understand where the settlement discussions will start. It is very useful to have a game plan for the negotiations as you proceed through what some mediators have called the "dance of symmetry."

Finally, make sure your client understands that once the opportunity for settlement has passed, the opportunity to be able to decide how the matter will resolve will pass from the client's control, into the hands of strangers (a judge and/or jury) to make the decision. Using these tools can help make sure the matter is resolved.