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THE RECORDER

Mediation: Stop, Look and Listen

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Mediation requires counsel to view the dispute differently than when preparing for trial. Counsel who are preparing for and engaged in mediation use a different skill set than counsel who are preparing or engaged in trial. It is important to apply the skill set which is appropriate for a given stage of the litigation. Counsel should consider the words on the sign at the rural railroad-crossing: Stop, look and listen.

First, stop thinking like a litigator and start thinking like a problem solver. A good place to start is with the mediation brief. Most lawyers understand that mediation briefs are designed to educate the mediator. Indeed, that is one goal. No matter how familiar the mediator is with subject matter, the mediator needs to understand what is so unique about your dispute that the attorneys had to resort to mediation. Let the mediator know.

If your mediation brief is designed only to educate the mediator you are still thinking like a litigator. You view the mediator as you would an arbitrator or judge. Your mediation brief should be used to educate the opposing counsel and the opposing party. Sometimes there is a moment of true revelation when you see something written a little differently than you have seen it before. Let the opposing counsel and opposing party know that their analysis of the case may have some problems. They will return the favor. Do it in a civilized and professional manner. They will hopefully start considering their position in a way they have never contemplated previously. This is the path that leads both sides to thinking about a compromise.

Your mediation brief should be used to educate your own client. In that process, have a clear understanding of what your client's real needs are, not only in terms of dollars and cents, but also what their interests are in the dispute and what is most important for a resolution of the matter.

Arrive at the mediation with a rough draft of a settlement agreement. This serves a number of purposes. First, the client knows that you, as counsel, are engaging in the mediation process in good faith. This is not an idle exercise and a backdoor attempt at discovery. This process is designed to resolve the dispute. The technical aspects of the settlement agreement should be discussed with the client in advance. The provisions of Civil Code §1542 and Code of Civil Procedure §664.6 should be explained to the client. This preparation will have the effect of showing the client that resolution of the case is seriously contemplated. The client, hopefully, will become part of the "team" brainstorming how to resolve the dispute.

Many mediators use pre-mediation calls. There are a number of goals in discussing the mediation without your client or opposing counsel present. First, counsel can speak freely. Let the

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mediator know what you think are the stumbling blocks to settlement. If it is your own client, this can be conveyed confidentially to the mediator. If it is a conflict between the attorneys, this, too, can be told to the mediator. Second, the more you withhold from the mediator, the more the mediator has to learn this during the mediation session. This is a waste of valuable time. There may be matters you do not want to share with the mediator, even confidentially. This can be quite appropriate. However, be sure that what you are withholding is something the other side really doesn't know and will not learn as the case progresses. Remember, holding back critical information from the mediator will make it more difficult and time consuming to reach a resolution. It may even cause it to be impossible to reach a resolution.

If you have questions regarding the process, this is a good time to clarify the format the mediator utilizes. The attorneys should be asking questions just as the mediator is asking questions. If your mediator does not initiate a pre-mediation call, the attorney should consider doing so. The attorney should be forthright in discussing what problems the mediator may encounter and the expectations of not only your client, but also how you perceive the other side's expectations.

Second, look carefully at and consider the merits of the other side's position. Look for areas of agreement between the parties. Those agreements can be a small step toward agreement on larger issues.

Be sure to look for indicators of where the other side may be willing to compromise. Initially, the areas of compromise may be on minor points, but it is a start.

Look for areas where your own client may be willing to compromise. Initially your client may not be willing to compromise on very many issues; however, any areas of compromise may be the groundwork for the ultimate settlement.

Third, listen to what is being said before you speak. Before, during and after the mediation everyone should be actively listening. That includes the clients, the attorneys and the mediator. Active listening means allowing a person to speak and only ask questions when it is really necessary for clarification. Do not interrupt the speaker to argue your position. You will be surprised what you can learn by remaining silent when someone else is speaking.

As attorneys we are trained to be advocates. Keep in mind that a good lawyer is adept at speaking; a great lawyer excels at listening as well.

For example, if the mediator is relating a position held by the other side, don't interrupt. Don't dismiss it immediately. Try to understand the other side's position. Ask questions if you need clarification. Consider where you might be able to concede on an issue important to the other side. Look for concession from the other side on an issue of more importance to you. Start looking for areas of compromise and start listening to what everyone is saying.

If you stop, look and listen you just might develop insights as to ways to resolve the dispute at mediation.