Litigation Interest and Risk Assessment

Help Your Clients Make Good Litigation Decisions

MICHAELA KEET, HEATHER HEAVIN, AND JOHN LANDE

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Appendix H

Neutrals' Guidance to Help Parties and Lawyers Prepare for Mediation

Many neutrals and mediation programs have settlement rates over 50%, so there is a good chance that parties will settle their cases in mediation. Given this reality, effective lawyers take mediation very seriously and understand that they can improve the outcome for their clients by preparing carefully before mediations convene. Similarly, effective neutrals know that they can improve the mediation process and increase the probability of settlement if the lawyers and parties prepare carefully. This appendix suggests how neutrals and lawyers can do this.

There may be different procedures in private mediation, judicial mediation, and judicial settlement conferences. For simplicity, this appendix refers to them collectively as "mediation" and the third-party practitioners as "neutrals," as discussed in Chapter 9. Practitioners differ in their philosophies about what techniques are appropriate or not. You should use your judgment about what techniques you believe are appropriate, being sensitive to the norms and rules in your practice community.

Lawyers sometimes send memos to neutrals before they convene mediation sessions. Some of these memos are shared with the other side, and some are provided confidentially only to the neutrals. There are advantages and disadvantages to both approaches. When lawyers provide the memos to each other, everyone could be better prepared—but lawyers are unlikely to be candid about weaknesses

in their legal case or their clients' real interests. On the other hand, lawyers are more likely to be candid in memos written solely for neutrals, but they may be unprepared if the other side raises issues they don't expect.

Although providing mediation memos should lead to better mediations, often this doesn't happen in practice. Many lawyers do not invest much time and effort into writing the memos, and so neutrals often complain about the poor quality of the memos they receive. Even when lawyers write confidential memos solely for the neutrals, the lawyers may not be candid.

Many lawyers are understandably wary of being candid for several reasons. Even when there are rules protecting confidentiality in mediation, mediation communications have sometimes been made public and used in court. In addition, lawyers generally provide documents to their clients, and it could be awkward to contradict assessments given to clients or disclose things that could embarrass them. Because of the problems with mediation memos, some lawyers and neutrals prefer to talk by phone ahead of time instead of communicating in writing.

Ideally, neutrals would arrange to get concise, factual memos that would be shared with the other side and also have confidential conversations with each lawyer. Neutrals would request memos to be provided far enough in advance so that they could read the memos and still have time to talk with the lawyers before the mediation session.

Mediation memos might address the following issues:

- Identity of the parties, lawyers, key expert witnesses, and any other important individuals or entities in the case
- The nature of the claims
- Itemization of damages (for defendants, their itemized valuation of the claims)
- Pivotal legal issues, possibly with citations of principal statutes, cases, or other legal authorities
- Undisputed facts
- Disputed facts
- Procedural history
- Status of discovery, noting potential future discovery
- History of negotiation, if any
- Identification of individuals expected to attend mediation
- Attachment of critical documents, such as pleadings and contracts

Separate identification of undisputed and disputed facts can be especially helpful. It should be useful to see if both sides agree about what is disputed or not. And it can help focus the discussion in mediation to understand the differences, clarify misunderstandings or misinterpretations, and develop realistic risk-adjusted estimates of the likely court outcome as described in Chapter 5.

Confidential conversations might address the following issues:

- How the mediator could be most helpful
- Strengths and weaknesses of the legal case
- Personalities and dynamics between lawyers and parties in the case
- Whether the parties will (or might) continue their relationship after the case is resolved
- Potential barriers to agreement
- Non-negotiable issues for each side
- Issues where negotiation is possible
- Realistic estimate of additional legal fees and costs if the case goes to trial
- Interests of each party that might prompt them to accept a less favorable financial settlement (see Chapters 3 and 4)

Generally, it is not a good idea to discuss the parties' bottom line in these conversations. Lawyers understandably are wary of seeming to make commitments about this, and neutrals usually are skeptical that lawyers will be candid about their bottom lines at this stage. Indeed, the bottom lines often change during mediation, so it is better to avoid this discussion before a mediation session.

For further discussion, see Brian Farkas & Donna Erez Navot, *First Impressions: Drafting Effective Mediation Statements*, 22 Lewis and Clark Law Review 157 (2018), ssrn.com/abstract=3056057.