

2023 Trends in Mediation

Presented By: Mediator Jonathan Andrews, Esq.

SIGNATURE
RESOLUTION

WELCOME MESSAGE



SIGNATURE
RESOLUTION



TRENDS

- Virtual vs. In Person vs. Hybrid
- Emotional distress
- Confidentiality
- Mandatory mediation?
- Specialization
- Cost/Normalcy



MEDIATOR PERSPECTIVES

- Discussing coverage issues pre mediation
- Have the information needed to make a decision
- Have a sense of plaintiff's value of the case
- Share information with other side
- Coordinate with outside counsel
- Communicate with the mediator

Diversity in Mediation

➤ ABA Model Standards :

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively

➤ California Rules of Court state:

A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.

GOALS OF MEDIATION



CHOOSING THE RIGHT TIME



Pre-litigation



Pre-deposition



**Pre-
Dispositive
Motions**



Pre-Trial

CHOOSING THE RIGHT MEDIATOR



Judge



Attorney



Agencies



**Mediator
Fees**

PRE-MEDIATION ASSESSMENT

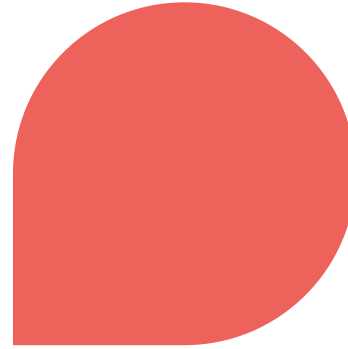
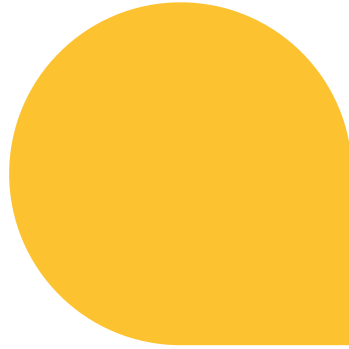
- Clear sense of potential liability and damages
- Allocation/coverage issues
- Budget potential fees/costs if no settlement
- Getting settlement authority
- How does the other side value the case?

SOLICIT PRE-MEDIATION DEMAND?

- Value of pre-mediation floor/ceiling setting
- Accuracy and effect of pre-mediation demand

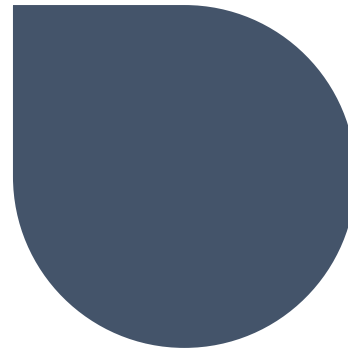
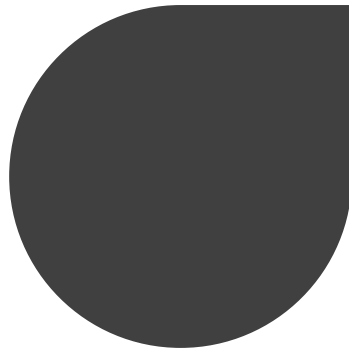
SELECTING THE RIGHT ATTENDEES

AUTHORITY TO SETTLE



FACT WITNESSES

DECLARATIONS



EXPERT WITNESSES

STRATEGY & PROCESS

- Sticking with the plan
- Integrative bargaining
- Psychology of negotiation
- Ethical negotiating
- Power moves – dealing with a difficult opponent
- Partnering with the mediator

Ethical Negotiating

- **Rules of Professional Conduct 4.1/ABA Model Rule 4.1**
- ✓ “[A] lawyer shall not knowingly make a false statement of material fact or law to a third person”
- ✓ “A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts”
- ✓ Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily not material statements of fact

Power Moves – Dealing With A Difficult Opponent

- Walkaways
- Best & final
- Increasing demands
- Threats (verdicts, discovery, etc.)
- Policy demand
- Client control issues

Incorporating The Mediator

- Listen to the cues
- Ask for advice
- Maintain credibility
- Access to decision makers
- Brackets
- Meetings outside presence of client

EXPANDING THE RESOURCES




- Outplacement
- Rehire (disability cases)
- Donations
- Unemployment
- COBRA
- Training
- Keeping equipment
- Apology
- Structured settlements
- Mediator fees

MEDIATOR PROPOSALS

- Unsolicited vs. Solicited
- Critical Terms
- Timing
- What happens if rejected

SETTLEMENT PAPERWORK

- Timing of payment: be realistic
- Scope of release (particularly in California)
- Allocations (wages v. 1099) & liens
- Understand state specific provisions (rehire, disclosure, disparagement, confidentiality)
- Public agency approval



QUESTIONS?