PREPARING YOUR CLIENT FOR MEDIATION: THE BASICS

By Margaret J. Grover*

Mediation is particularly useful in resolving employment disputes. Employment disputes are often emotional. Unrealistic fears or expectations can impair the parties' ability to negotiate a resolution. Former employees may have been deeply invested in their job and, as a result, feel personally attacked when their employment ended. Employers may be concerned that settling one case will open the floodgates of litigation. A good mediator can allow the employee to release their emotions by telling their story to a neutral party. The mediator can also assist both parties to understand the risks of continuing litigation and benefits of early resolution.

1. *The Mediation Process*. Your client may never have participated in a mediation. While this is more often true for employees, small businesses and corporate representatives may also be unfamiliar with the process. To assure that they understand what to expect, your explanation should be basic and provide lots of opportunities for questions.

If you have not worked with the mediator, check with him or her to determine how they handle the mediation. Will they hold a joint conference? Will they provide opinions about the merits of the case? What techniques work best for them? With this information, you will be able to provide your client with clearer expectations for their mediation.

When you speak with your client, explain that the goal of mediation is to reach resolution. The mediator will not decide the merits of the case, and neither side will be a winner at the end of the day. Instead, the mediation provides both sides with a unique opportunity to control the outcome of the case, rather than having their fate decided by a judge, arbitrator, or a jury.

Explain that, in evaluating their settlement whether to settle, your client should account for the hard costs of continuing litigation, the delay in resolution, and the risks of an unfavorable or less favorable outcome. Other important factors include business disruption, as well as time spent and emotional impact of participating in discovery, including depositions, and attending trial.

2. *Confidentiality*. Before mediation, the client is required to receive and sign a Mediation Disclosure Notification and Acknowledgement in substantially the form that follows this article. (Cal. Evid. Code § 1129). The client should understand that confidentiality is limited. The mediator cannot be called to testify about what occurred during the mediation. Information about offers that were exchanged during mediation cannot be provided to the trial judge, arbitrator, or used at trial. However, if facts are disclosed during mediation, those facts could be the subject of questions at deposition or through interrogatories. This may militate in favor of maintaining a confidentiality of key facts. However, in discussing whether to disclose facts, it is a good idea to explain that the mediator has limited ability to use facts that are not disclosed to the other side.

3. *Mediator's Role*. Many litigants expect that the mediator will make a decision or offer opinions about the merits of the case. While mediators often point out strengths or concerns, your client should understand that the mediator is not able to decide the dispute. Explain that the

* Maggie Grover is an experienced employment mediator and recovering litigator. She regularly conducts workplace trainings and helps both employers and employees understand their rights and obligations under the complex laws and regulations governing the workplace in California. She practices with Grover Workplace Solutions, P.C. and can be reached at 415-596-9433 or mgrover@groverworkplacesolutions.com.

mediator's job it to persuade both sides to reach a mutually acceptable solution. In doing that, the mediator may well focus on shortcomings and weak points of your case. Your client will handle this better if they understand before the mediation that every case has some weak points and some strong points. Reinforce the mediator's role as a neutral, so that your client is not offended or does not start to believe that the mediator is taking the other party's side.

4. *Waiting Time*. Clients can become anxious if the mediator spends a long time in the other room. Explain that mediation sessions can be very long, particularly at the beginning of a mediation. The mediator is building rapport with parties and their counsel, gathering the facts, and allowing the parties to feel that their concerns have been heard. Let your client know that a long absence may enhance the likelihood of settlement and that sessions will go more quickly as the day progresses. Advise your client that, although they should not expect to conduct much work outside of the mediation, it is fine to bring work, a book, crosswords, or even knitting.

5. *Rehearsal*. Your client will be more effective during mediation if they are comfortable. You should review the process and let your client know what you expect the mediator will say. Role playing is often useful, so that you understand and shape your client's presentation. You know the key legal points and what is relevant, but your client will always be more knowledgeable about the facts and the effect of the litigation.

6. *Negotiation Strategy*. Clients have a variety of approaches to mediation, some of which do not work well. Explain that, in a typical employment negotiation, the parties' initial positions are usually unrealistic and not indicative of the amount at which the case will eventually resolve. Moving too quickly early in the process can cause the other party to have a false expectation. Moving too slowly can end the process abruptly. The client should be prepared to let the process unfold. The client should not be offended by the other side's initial position, nor should the client become wedded to their own initial offer. Flexibility will be required on both sides to reach resolution.

7. *Mediation Goals*. Reinforce the benefits of early resolution: finality, avoiding future costs, avoiding future stress, and developing a known outcome. In some employment cases, non-monetary consideration, such as reinstatement, training, or an apology can be useful in creating a mutually workable solution. The client should understand that, although many cases settle through the mediation process, the parties rarely feel that they have won the case. Instead, they have avoided risk costs and emotional impact of extended litigation. They have moved on from the dispute and can focus on their future.

Mediation Disclosure Notification and Acknowledgement

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 115 to 1119, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, _____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

_____	_____
Signature	Signature
_____	_____
Name of Client	Name of Attorney
_____	_____
Date Signed	Date Signed