LAYING THE FOUNDATION FOR SETTLEMENT WITH *EX PARTE* COMMUNICATIONS

By

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Introduction

Ex Parte communications are commonplace and completely ethical in the mediation process. Indeed, where "shuttle diplomacy" is the process model *all* communication is *ex parte.* In this paper, regardless of the model employed, I recommend using *ex parte* communication with counsel prior to the date of mediation but after receipt of written submissions as a powerful tool for building mediator capital and establishing a solid foundation for dispute resolution. The call has multiple goals and objectives including:

- Cementing a prior relationship with counsel or building a relationship where none previously existed.
- Gathering important information not included in written submissions.
- Providing advocates an opportunity to speak candidly outside the presence of their clients.
- Demonstrating the mediator's commitment to helping advocates achieve their client's goals.
- Planting seeds for useful techniques to be used once the mediation begins.
- Reminding counsel to sign the Agreement to Mediate, have their clients do so, and return it to the mediator.

During the years of my practice, I created a check list of potential topics to address during the call. See attached, "Check List for Lawyer Conversations." I was unlikely to ask all in any given call; and, often added questions as I reviewed written submissions.

Establishing Confidentiality

The call should start with an explanation that this is a standard part of the mediator's preparation; all counsel will be contacted; and it is traditional/customary to start with plaintiff counsel, unless time does not allow waiting until plaintiff counsel is available.

To encourage candor the mediator should first establish confidentiality ground rules for the conversation. If there is anything counsel wouldn't want disclosed to the other side, they need only say so and the mediator will keep it under wraps. My practice was to place responsibility on counsel. Unless they expressly designated something confidential, I explain, I would consider it fair to use in the other room especially if I thought it might be helpful.

As additional reassurance, I would promise to provide an opportunity to place any other information disclosed in the confidential category before hanging up the call. Finally, I added, if it later appeared disclosure might be helpful, I would explain my thinking; then "happily" live with whatever decision they made.

Gathering Information Through Questions

Once ground rules for confidentiality are established, I recommend soliciting suggestions from counsel for techniques or an approach the mediator might employ. Many advocates offer mediation services themselves and could provide thoughtful insight. "You've been living with the dispute for some time," I might begin. "Do you have any ideas for me? If you were mediating this case, what approach or techniques would you employ?" Most often they do not have suggestions. Advocates appreciate the question, however, and, as noted, sometimes have helpful ideas.

My second topic seeks insight into the parties. "Tell me about your client," I always asked. "Is there anything I can do to help you with your client? Is there a message you've been reluctant to deliver, for example, that I could do the heavy lifting on? Is there a message you have delivered but which could use some reinforcement from me?" Lawyers are often candid and frequently provide~~d~~ useful insight to guide management of the process.

I next ask~~ed~~ about non-economic needs, demands or terms. "Have you discussed with your client their non-economic objectives?" Often, the answer is no. This call, therefore, gets *that* conversation started between counsel and party. This is important, because once a dollar negotiation starts, non-economic terms can become stumbling blocks to resolution. It's generally best, therefore, to get these out on the table at the very beginning. In an employment dispute, for example, is plaintiff seeking a letter of recommendation? Does a party believe liquidated damages are needed to discourage disclosure of confidential terms? It is often easier to reach agreement on non-economic terms before addressing money.

If the dispute does not settle, I wanted to know counsel's biggest concern. What are they most worried about? "What might keep you up at night? Are you worried about disclosure of proprietary business information, for example? Or public exposure of private or embarrassing internal conflicts or problems? Do you worry about dragging an important customer or client into the dispute?" Answers to these questions often bring out important risk topics to consider at the mediation table.

How are they getting along with the other side? Do the lawyers trust one another? Have personality conflicts aggravated the dispute or made settlement more difficult? What's driving any hostility? Issues lurking beneath the surface – lawyers rubbing each other the wrong way, for example – can threaten progress if not identified early. And related: are there any other non-legal issues that might impact resolving this dispute the mediator should know about?

What do the advocates consider the biggest impediments to resolution? Do they have suggestions for neutralizing or ameliorating them, finessing or otherwise getting around them?

Whose turn is it to make the first move at the mediation table? I always ask whether the parties are willing to disclose the status of their negotiations during the *joint* pre-mediation conference call. The reason to ask with all lawyers present is that the parties do not agree in at least half the cases! Most lawyers believe that where there have been no pre-mediation negotiations, the plaintiff should make the first offer. Plaintiff brought the case and presumably knows what the dispute is worth. Accordingly, plaintiff should start. Lawyers also believe that if one side made the last offer, the offeree should put the first number out at mediation. On occasion, a plaintiff lawyer may try to shift the first number burden onto the defense. I try to discourage that with the following points:

- Plaintiff going first is the natural order of things.
- If plaintiff tries forcing defendant to start, plaintiff's counsel risks losing respect and credibility. And, regrettably, so does a mediator who goes along with the request.
- Defendants might disengage and leave the table.
- No plaintiff attorney in my experience has ever been happy with an opening offer where defendant was forced to go first.
- Finally, "anchoring" research suggests that the final settlement number is generally closer to the first number offered in a negotiation than to the second. In other words, plaintiffs get better results when they go first.

As noted above, during the joint pre-mediation conference call I use for process design and deadline setting, I encourage defense counsel to share boilerplate Final Settlement and Release of all Claims language with plaintiff's counsel. Most promise to do so. If the document is shared and reviewed in advance, hours of negotiations over language *after* agreement is reached on dollars and terms can be avoided. The *ex parte* call provides an opportunity to remind counsel to make it happen. The hope is that exchanging final language gets counsel talking, sets the stage for productive negotiation and gives the parties a sense of optimism about a positive outcome. "Does plaintiff counsel have any problems with the language? Is it acceptable as written? What changes, if any, are sought?"

I also recommend soliciting potential risk questions to ask in the other room. "You know the case better than I do. What do you consider the biggest risks the other side faces? What questions would you be asking if you were me?" If counsel is candid and willing to engage on this, I might also ask for a list of the toughest risk questions to ask their own client.

Does counsel need any additional information from the other side before they can mediate effectively? What do they need? Can I help obtain it for them on short notice?

What's been the hold up? If important discovery or document exchange is late, I did my best to obtain it for them.

Who needs to be present for each side for an agreement to be reached at the table? In my experience, when real decision-makers are not at the table, it is easy for them to reject final offers by telephone. They were not present to hear the risk questions, observe the reactions, or participate in the discussions that are part of the softening up process. Bringing someone up to speed can be challenging, especially if resistant to what they are hearing.

Is the defendant collectible? If defendant is claiming poverty or inability to pay a settlement, what evidence would be needed to accept the assertion as credible? For the party claiming poverty, I encouraged production of their books and records to demonstrate the credibility of their claim. Refusal to produce them adds fuels a plaintiff's belief that the assertion of poverty is a pretense. I could often rely on experienced defense counsel to support the effort.

Are there any facts which the other side doesn't have that might cause them to change their evaluation of the claim? What do you suppose those facts are and why don't they have them?

How much has been incurred in attorney fees and costs to date? If counsel doesn't have that information: "Are you willing and able to pull it together by the morning of mediation?" There are two reasons for this: First, overall costs and fees are an important consideration in determining whether to settle and on what terms. Second, a prevailing party may be entitled to recover fees and costs as in employment discrimination disputes. Precise amounts expended are very relevant to valuation.

Has counsel prepared a litigation budget if the matter doesn't resolve at mediation? How much more is the litigation expected to cost? Has the client been informed? If the parties have not prepared a litigation budget – or it has been a long time since a budget was prepared: "Will you prepare a rough budget by the time of mediation so we can discuss potential fees and costs compared with the other side's last and best offer?" I encourage them to include the cost of experts, if any; the preparation, drafting and argument of dispositive motions they might be considering; and how much additional discovery might be needed.

Has counsel analyzed the underlying needs and interests of their own client? In other words, what is driving this dispute? Are there external factors impacting motivation to settle? What are they? What about opposing party? What are their needs and interests? Does identification of needs and interests inform possible terms to include in their proposals to settle?

Are there any safety or danger issues we should know about? PPOs, threats, prior lawsuits, history of violent or threatening actions?

If mediating via Zoom, will counsel and client be in the same location? This information will help me recognize who is seeking admission to a Zoom session when parties seek to join the meeting.

Finally, are there any other issues they think need discussion?

Before hanging up, I clarified what we marked as confidential, if anything, and asked whether in retrospect anything else we discussed should be added to the protected list. "Here's what I marked as confidential. Is there anything else we discussed you wouldn't want me to disclose?"

Conclusion

The approach suggested here is designed to strengthen the mediator's relationship with counsel, and gain additional trust and confidence in the mediator and the mediator's process. At the conclusion of the call, advocates will have observed the mediator's thorough preparation which should enhance confidence and trust. The questions help counsel recognize that the mediator's goal is to help find a satisfactory resolution; and that the mediator is fair minded and capable of managing a safe, productive and useful process. By employing this *ex parte* tool as recommended, the mediator builds credibility and capital to overcome obstacles, build trust, improve communication and understanding and establish the foundation upon which the parties can reach a resolution of their dispute.