

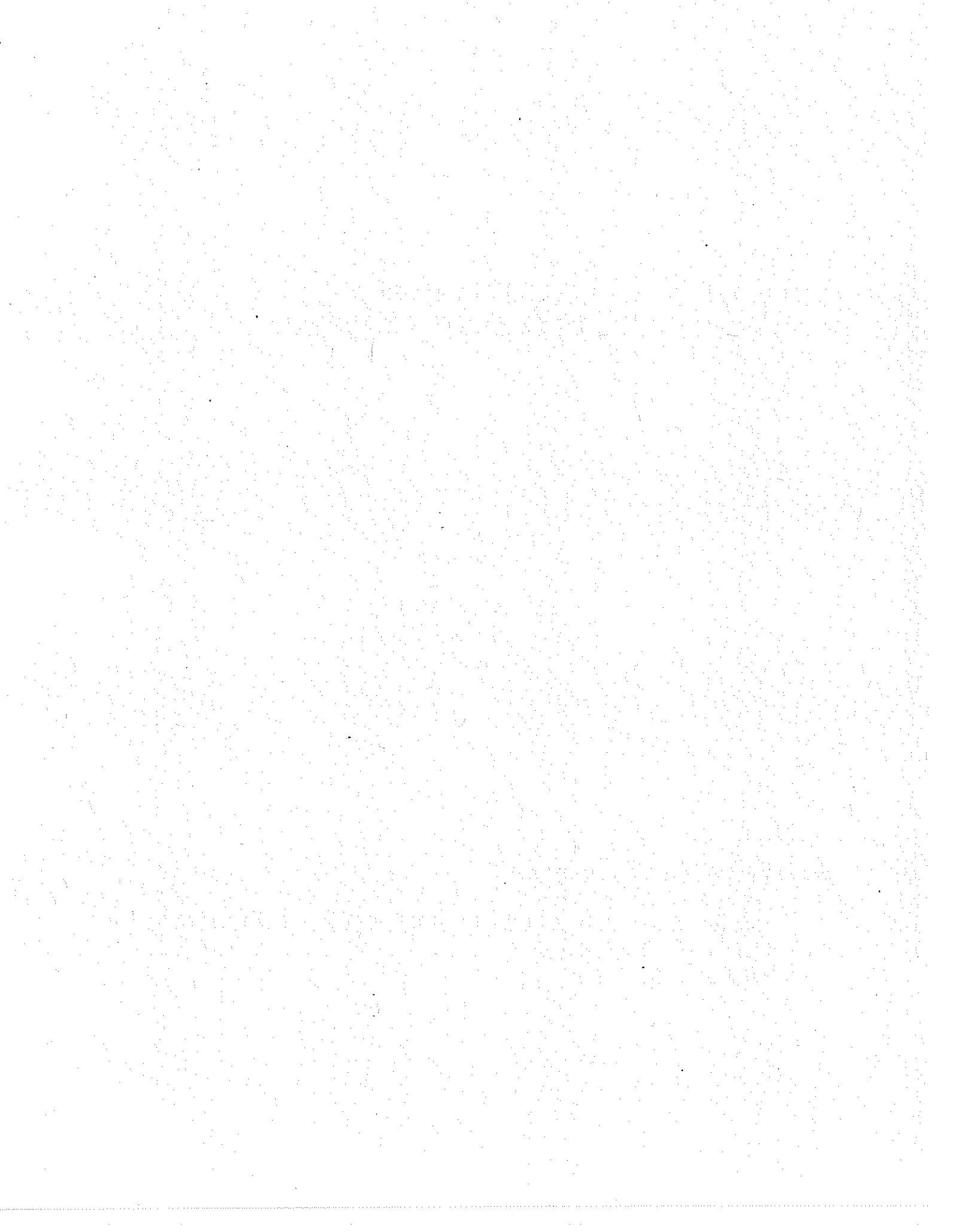
**MEDIATION  
IN A UNIVERSITY SETTING**

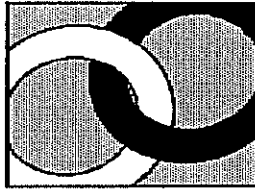
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**LITIGATION  
RESOLUTION  
INCORPORATED**

**MEDIATION  
IN A UNIVERSITY SETTING**

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# MEDIATION IN A UNIVERSITY SETTING

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## MEDIATION IN A UNIVERSITY SETTING

### I. INTRODUCTION

In many parts of the country, state legislatures have promulgated statutes detailing substantive rules regarding mediation in their state courts. Likewise many federal and state courts have promulgated procedural rules regarding mediation in their own jurisdictions. These statutes and rules detail what types of cases are subject to mediation, when one must mediate in relation to trial, who must appear at mediation, filing of reports with the court in preparation for and after the mediation, and the certification and qualification of mediators.

The statutes and rules regarding mediation in any particular state or jurisdiction will not be reviewed in this article. The purpose of these materials is to discuss how to prepare for mediation in order to increase the likelihood of settlement between the parties.

#### 1. TO MEDIATE OR NOT

You may choose to mediate in order to limit the time and money spent in litigation, or you may mediate because you are required by a court order or the terms of a contract. Mediation is beneficial no matter what brings you to the table. It is a less adversarial method than trial to resolve differences. It allows parties to speak face-to-face and voice their opinions, concerns, and questions - something they cannot do in trial. It also allows the parties to participate fully and speak when they wish as opposed to only speaking when a lawyer or judge asks a question. Further, mediation allows the parties to fashion a resolution that may give them (by their own agreement) a result that is broader than that a court could order. For example, no court will order a university to purge an employee's personnel file, or prepare a letter of recommendation. These are items, however, that can be negotiated in a mediated settlement.

Even if the parties do not settle their dispute at the conference, mediation is beneficial. If they leave the mediation with a clearer understanding of their own position and risk vis-a-vis their opponent's, then the mediation has accomplished an important purpose. A clear understanding of the parties' respective strengths and weaknesses allows for an educated decision regarding settlement.

## **2. WHEN TO MEDIATE**

Some matters can be mediated prior to the filing of a lawsuit, some in the midst of litigation and some only shortly before trial. Many prefer to mediate pre-suit because the least amount of money has been invested in attorneys fees, and the parties have not had as much time to become entrenched in their views. Other people prefer to mediate after some initial discovery (i.e. depositions and exchange of documents to be used in the litigation) has occurred. Those who mediate at this time do so, in part, because they want to have an idea how the testimony and evidence will play out in trial, but don't need to have nailed down every issue. Still, others prefer to mediate only after all discovery has been completed, all dispositive motions have been ruled upon by the court and the case is ready for trial.

The ideal prerequisite is that the parties be sufficiently informed regarding their rights or duties and regarding the facts and law which will either support or defeat their claim. The case is ripe for mediation when the parties are relatively equally informed regarding the facts, and are thus best able to intelligently evaluate their risks.

## **3. CHOOSING A MEDIATOR**

Litigants are best served by retaining a mediator who is certified by the appropriate state and court authorities and who is experienced in the same area of law as the case to be mediated. Many states and courts have set guidelines in certifying mediators in order to ensure that litigants have a

competent mediator and an effective mediation. Numerous courts require experience beyond the basic state certification. A party may not necessarily be required to retain a *certified* mediator in order to comply with a court order or contractual obligation to mediate. The parties might agree to mediate in front of anyone, certified or not. An experienced mediator that is familiar with the area of law which is the subject of the suit, however, brings useful experience to the table. Some people believe that a very good mediator can mediate any case; and that may be true. If the mediator has experience with the area of law (e.g. labor, contract, etc.), however, the mediator can get to the critical issues far more efficiently. The parties are frequently paying their lawyers by the hour, and are certainly paying the mediator by the hour. A mediator who understands the issues of law, the elements which will need to be proven at trial, the types of evidence the parties might need to succeed in their claims or defense, and the types of relief a court can order, should be able to conclude the mediation more efficiently and successfully than someone who first needs an education on the issues, proof and damages.

When one party to the mediation is a university, certain issues arise that are specific to the university client. For example, a settlement may require approval through a chain of command in the administration. A decision affecting one group of students in a particular club, may need to take into consideration students in all other clubs. A decision that might seem to impact only one student, may in fact impact entitlement to federal funding. A decision which seemingly affects only one professor may be used by another professor to argue for entitlement to tenure. These are issues that might never come into play in mediations involving private corporations. Therefore, the parties are better served by retaining a mediator who is experienced in mediating with universities and who is experienced in the same area of law as the case to be mediated.

#### **4. WHO SHOULD ATTEND THE MEDIATION**

Mediation works best when the decision makers (those with the *final* authority) personally appear at the mediation. In a university setting, this frequently requires the attendance of two or three different university personnel in addition to the lawyer. While some may consider this superfluous, the investment of three individuals for a single day is far less expensive than preparing for and attending a one or two-week trial.

The consideration of whether or not to bring all of the necessary decision makers should not be based on whether you believe that the case can be settled at mediation. Frequently mediators settle difficult cases only to be told, "I can't believe it settled! I never thought it would settle! I never thought that the other party would accept our proposal!" If both sides bring the decision makers to the table, a case no one thought could settle has a much greater likelihood of settling. Without the parties with authority, however, the mediation may have little chance of success.

Personal appearance of the decision makers is also important because it conveys to the other side the fact that you are taking the case seriously and are doing everything necessary to give the mediation the best chance of success. The decision makers' appearance at mediation conveys to your opposition that you are there to do business, and there is no need to hold back any options than might facilitate settlement.

Availability by phone is not a good alternative to the personal appearance of a party at the mediation. Frequently, a party's decision to settle, or not to settle, is based in part upon what they *see* at the mediation. Some things can only be seen and not heard or perceived by telephone. A party might plead their cause at a mediation conference, and their appearance, dress, facial expressions, warmth, sincerity, self-control or lack of self-control might only be evident when sitting across the table, not by staring at a speaker phone. It is very important to see the other side to truly evaluate their anticipated effectiveness as a witness, or to note any nervous habits or to ascertain their



veracity, or a host of other issues which can directly affect your interest in settling the case. If you must appear by telephone, it is best to obtain the opposition's (and in some cases, the court's) approval in advance. Some courts require personal appearance of the parties unless the presiding judge has excused them in writing in advance. In other cases, opposing counsel will not agree to proceed without the personal appearance of a party. If a telephone appearance has not been approved in advance, both sides may waste time and money attending a mediation which may quickly terminate.

## **II. PREPARING FOR MEDIATION**

With the proper preparation for mediation, the time spent can yield an immediately recognizable result in the settlement.

### **1. PRE-MEDIATION ANALYSIS**

Mediators take the litigants through certain analyses at the mediation conference. Knowing this and being fully prepared will greatly increase a party's ability to negotiate a favorable settlement.

In order to prepare for mediation, clients and their lawyers need to analyze the following in advance of the conference:

1. What documentary evidence exists to support your position?
2. Who are your best witnesses and what will they say?
3. What damages are sought in the claim/counterclaim, and what is the breakdown and basis for each element of damages, including attorneys fees and costs through the date of mediation. (Even if you are not seeking damages, analyze the opposing party's damages.)

4. What is your worst case scenario if a settlement is not reached at mediation (including how long will it take to get a trial or final summary judgment result, what will it cost to get a trial or final summary judgment result, what is the likelihood of an appeal, and what are the risks of collectibility)?

5. What is your best case scenario if there is no settlement at mediation?

6. If you settle, what terms are less negotiable than others and what standard language must be included in a settlement agreement?

## **2. ITEMS TO PREPARE AND BRING TO MEDIATION**

A. Bring a detailed analysis of the damages, including a breakdown of each element of damages.

B. The client and the lawyer should bring to the mediation any documentary evidence and case law that they believe is particularly persuasive of their position. Documentary evidence may be as simple as a typed chart detailing damages or something as extravagant as trial exhibits placed on an easel. The most persuasive evidence may be the client's own statements regarding the facts of the case. A litigant relating their issues, needs, understanding, and prerequisites for settlement can be the turning point in reaching a settlement. Even if each counsel has heard the testimony or seen the evidence and case law, mediation is often the first time each client may see or hear the other side's position, without it being filtered through their own attorney. Even if both lawyers and clients have seen it all and heard it all, the mediator certainly hasn't. Letting the mediator have the best evidence allows the mediator to present it to the opposing counsel and party with an independent analysis. It helps a party to focus on their own and their opposition's strengths and weaknesses when they are faced with testimony, documentary evidence or case law which they know will be used at trial. Mediators want to test each party's view of their case, to see whether or not their position is realistic. Employing evidence that will be used at trial is very useful for this purpose.

C. Bring any form or standard language which must be included in any settlement. You can always include the phrase, "the parties agree to execute any additional documentation necessary to carry out the intent of this agreement"; however, if you bring your form release, or form confidentiality language, you can avoid disagreements later.

### **3. SEND A REPORT TO THE MEDIATOR IN ADVANCE**

Providing the mediator with a report in advance of the mediation is always helpful. It helps the party to focus on their real damages (or their opponent's real damages), it helps the attorney to focus on the issues which need to be analyzed before mediation and it helps the mediator to focus before the parties sit down together. Reports that specify the causes of action, the disputed issues of law and disputed issues of fact are frequently sufficient. Some attorneys prefer to send copies of contracts in dispute, affidavits of witnesses, and excerpts of testimony. All of this is helpful. Whatever information mediators have in advance is less information that needs to be fed to them at the conference. The more information the mediators have, the more reality testing they can do at the mediation.

## **III. THE MEDIATION CONFERENCE**

### **1. INTRODUCTORY STATEMENTS**

Introductory statements at mediation serve two purposes. They educate the mediator to the extent any preparatory reports did not, and they allow each party to see the lawyers as they will appear during opening statements before the jury or judge hearing their case. While mediation is not an adversarial process, it is important for everyone at the conference to see counsel present the case as they would at trial. This allows each party to realistically evaluate what to anticipate at trial. For those who go to mediation hoping to settle, but with little belief that the opposition has an interest in

settling, strong introductory statements, including references to documentary evidence and testimony, help to persuade the opposition of their hurdles to success. To avoid a perception of being adversarial in the presentation, lawyers and parties should direct their statements to the mediator.

After the lawyers have given their opening statements, the parties might wish to add some comments which illustrate their issues or questions. Communication is the key to a successful mediation. As long as the parties can communicate directly without the necessity of confidential conferences with the mediator, it is useful. Allowing the parties to communicate directly with each other helps to forge a foundation upon which to build a settlement. Talking about the issues that brought them to litigation, and their respective needs in any settlement makes any decision a joint creation that both sides will be more likely to work to uphold. When the parties work together to develop a settlement versus one party dictating all of the terms of settlement, there is a positive joint interest in the agreement.

## **2. THE NEGOTIATIONS**

Thousands of books have been written on the subject of negotiation. It is not the intent of this article to suggest or recommend any particular style. How one negotiates in mediation depends in part upon the personality of the parties involved, the amount of time you have to mediate, the sensitivity of the subject being mediated, and the feeling (or lack of feeling) of wrongdoing held by either party.

What is important to remember during any mediation is to ask a lot of questions. The more one understands the opponent's opinions, needs and desires, the better prepared you are to answer those issues and resolve potential roadblocks to settlement. Secondly, it is important to remain open-minded. One side may think they know what is important to their opposition, but consider all possibilities. Frequently, parties walk into a mediation assuming that their adversary has certain

parameters for settlement, when in fact the adversary's position is very different. For example, in an employment setting, an employer may think the employee only wants money (and a lot of it), when many times a job is the critical element to settlement.

### **3. THE SETTLEMENT AGREEMENT**

Parties often spend five hours mediating a settlement and only 15 minutes drafting the settlement agreement. In some states and jurisdictions, in order to have an enforceable settlement at mediation, the parties and their counsel must execute a written agreement, even if it is only an outline of the terms which will be formalized later. Before coming to mediation, each side should have analyzed what terms are non-negotiable and what standard language must be included in a settlement agreement. Bring that language with you to the mediation. Too often, parties are exhausted after negotiating all day; and in their desire to leave draft their settlement, or summary of their settlement, too quickly. Frequent disagreements over exactly what other claims will also be dismissed, or what exactly is meant by the non-disclosure language can be avoided by bringing form language with you to mediation.

