

## GENERAL MEDIATION REQUIREMENTS

*Phil Cutler*

WHAT

WHEN

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### *Pre-Mediation Settlement Conference*

*Before mediation conference*

Counsel for the parties (or the parties themselves) should meet at least once prior to the mediation and engage in a good faith attempt to negotiate a settlement of the action. Unless the parties have attempted to settle their dispute on their own, a significant amount of time is spent at the mediation conference defining the parties' settlement positions and otherwise setting forth a framework upon which a settlement can be based. This requirement may be waived in appropriate circumstances.

### *Mediation Memo & Operative Pleadings*

*1 week before mediation*

**→ A copy of this memo is to be provided opposing counsel at the time it is provided to the mediator. ←**

A concise memo (5-10 pp, letter form preferred) from each separately represented party:

- ✓ identifying by name and title or position the person(s) with decision-making authority who, in addition to counsel, will attend the mediation conference for that party and, if applicable, identifying any person(s) connected with a party opponent whose presence at the mediation conference might substantially improve the productivity of the proceeding;

- ✓ describing briefly the substance of the dispute, addressing key liability and damages issues, and discussing the most significant evidence;

- ✓ identifying any discovery or motion activity that is likely either to significantly affect the scope

of the litigation or to enhance the parties' ability to assess the case's settlement value or, for other reasons, to improve prospects for settlement; and

✓ enclosing a copy of the party's operative pleading (complaint/arbitration demand, answer/response, counterclaim, reply)

### ***Confidential Settlement Memo***

***1 week before mediation***

**→ This memo is to be provided to mediator only and is *not to be provided to opposing counsel.* ←**

A short memo (3-4 pp, letter form preferred) from each separately represented party:

✓ summarizing the history and current status of settlement negotiations;

✓ setting forth the party's current settlement position, demand or offer;

✓ estimating the legal fees and costs incurred to date by the party and a good faith estimate of the amount of trial/hearing time and additional expense required to try the case to conclusion if the case is not settled at the mediation;

✓ identifying underlying personal or business interests, concerns, objectives, or other considerations relevant to settlement; and

✓ identifying "other" consequences to the party (and its opponent) if a settlement is not negotiated in the near future.

### **OTHER REQUIREMENTS:**

#### ***Personal Attendance by Client Representative at Mediation Conference***

The in-person personal presence of a client representative with ultimate settlement authority and some knowledge of the dispute is essential to a successful mediation.....each

party is expected to have present, in person, a representative with decision-making authority, including authority to modify prior settlement authority.

***Personal Attendance by Lead Counsel at Mediation Conference***

If a party is represented, lead counsel for that party is expected to attend in-person and participate in the mediation.....counsel should be prepared to knowledgeably discuss both liability and damages issues and the position of his or her client relative to settlement.

**NOTE:** *After reviewing the mediation and settlement memos, Phil will frequently call counsel to discuss (separately) the case generally, the client's settlement perspective and goals and the most appropriate format for the mediation.*