Practical Tips for Presumptive ADR Participants: Five Do's and Don'ts for Pre-Mediation Statements

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In light of backlogs resulting from closures due to COVID-19, many courts are turning to presumptive ADR programs. As a result, mediation has become, more than ever, a necessary alternative to litigation. Many lawyers and clients, however, are less experienced with developing mediation strategy, which in turn impacts the potential for the parties to reach agreement. For example, mediation statements are a critical opportunity for parties to educate the mediator and help her prepare for the day of mediation. Oftentimes, lawyers do not use this opportunity as effectively as they could. The most useful mediation statement is one that: helps the mediator understand why the parties are where they are; what issues need to be resolved prior to reaching an agreement, and what is important to a party in any negotiated resolution. The following are five do's and five don'ts to keep in mind when drafting a pre-mediation statement.

Five Do's for Pre-Mediation Statements:

1. **Do provide the mediator with sufficient history to understand who the parties are, their relationship, the nature of the dispute, and the procedural status of any litigation.**

   Tell the mediator the relevant facts necessary for her to understand what has transpired. She also needs to be aware of any events or legal rulings that have impacted or will impact the value of the case. Also tell the mediator of any

ongoing relationship or business objectives between the parties. For example, tell the mediator if the parties are still engaged together in some business capacity or if there is the potential for future business opportunities. Similarly, if there are other disputes or litigation pending between the parties, the mediator should know this to understand where the current dispute fits within the context of the larger relationship.

2. Do identify any gating issues that need to be addressed in order for the parties to resolve the dispute.

Gating issues may or may not be the same as the legal issues that a judge or jury will determine at trial. They also may not be directly at issue in the case at all, but nevertheless, are necessary to address in order for a party to reach an agreement. In terms of the former, if there is a legal aspect of the case on which the parties completely disagree, and this has a direct impact on the quantum of damages at issue, educating the mediator is critical. (You may also want to consider seeking an evaluative mediator who can provide a third-party neutral opinion on this aspect of the case.) For example: even if the parties cannot agree to the total damages amount potentially available at trial, it may be useful to identify and try to agree on the types and ranges of amounts of various categories of damages that the plaintiff seeks. In an employment case, this could involve negotiations around the categories of compensation eligible to the employee (e.g., base salary, bonus, restricted stock units, etc.). Similarly, where a party is unable to reach a negotiated resolution without some condition, tell the mediator about this condition as early as possible so that she can determine when it should be raised with your adversary. This could include non-negotiables such as the need for, or language of, a public disclosure, press release, or an employee letter of reference.

3. Do tell the mediator "why" your stated positions are what they are.

In other words, what interests must be met in connection with any negotiated resolution? This could include concerns about a company's stock price, liquidity, wherewithal, copycat suits, or other interests that impact the party's evaluation of any potential agreement. Oftentimes, impasse results because the parties fail to appreciate and understand the reasoning behind their adversary's position. While sometimes these reasons need to remain confidential from the other side, sharing with the mediator can help her facilitate the negotiations.

4. Do inform the mediator of your willingness to explore alternative currencies to a cash settlement.

Identifying your willingness to consider alternatives to an all cash settlement does not automatically mean these alternatives must be explored. The mediator will not be making proposals without your permission; however, enabling the mediator to understand the scope of available solutions optimizes her ability to assist you in developing options.

5. **When you have the opportunity to provide *ex parte* submissions to the mediator, do trust the mediator to keep the information confidential.**

   Many lawyers worry about showing their hand too early to the mediator, but holding information back impedes the mediator's ability to do her job effectively right from the outset. The mediator will only share information with your adversary with your consent, and because your adversary has disclosed confidential information to her, she is likely in a better position to help you strategically play your hand at the right time.

Five Don'ts for Pre-Mediation Statements:

1. **Don't regurgitate your memorandum of law from the motion to dismiss or summary judgment motion.**

   While identifying important gating legal issues is necessary, arguing your case to the mediator is not since she is not making any rulings or issuing any orders. There is no need to prove your conviction or that you are a good litigator, and the mediator already expects you to insist that your case is the better one. Moreover, if a dispositive motion has previously been filed, the mediator can read the briefing and any relevant decisions if you think it is important for her to do so. Thus, you can streamline your mediation statement to include only those facts and issues that are important to the negotiations.

2. **Don't make unreasonable demands as your opening position.**

   Mediation and litigation are two different processes and require different approaches and strategies. The mediator expects you to have conviction in your case, but legal posturing often becomes counter-productive. When a party starts the bidding from a point that is hard to justify under objective standards, they can and should expect their adversaries to counter in turn. The resulting gamesmanship makes the mediation more difficult than necessary, creates more negativity, and can quickly lead to impasse.

3. **Don't make accusatory or derogatory statements about the other side.**

   Keep things civil and collaborative. Remember, the goal is to reach a negotiated resolution. When you come in ready for combat, you are pushing the parties further apart.

4. **Don't insist your case is infallible.**

Instead, remain reasonable when presenting your chances of success at trial, risks and settlement range. Again, this is consistent with the collaborative approach that helps maximize chances of resolution.

5. Don't conceal important facts from the mediator.

First, mediators know when something does not quite make sense or add up. If you are hiding something, you are inhibiting the mediator from effectively facilitating the negotiations. Inform the mediator of your concern so that the negotiations do not head in a direction where you find yourself backed into a corner. Second, if you have a smoking gun, let the mediator help you determine when to use it. When lawyers try to keep facts or evidence in their back pocket for some later date in the litigation, they are conceding (likely too early) that the parties will not reach a negotiated resolution.