NCRC WEST COAST RESOLUTION GROUP

"Oh, By the Way": A Guide for Avoiding Surprise Negotiation Terms in Mediation

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Experience has taught me that successful dispute resolution is primarily about the money.[1] However, there are almost always other, non-monetary points to be ironed out in the context of any proposed settlement, and failure to flesh out these additional considerations can lead to misunderstanding, renegotiation of the settlement amount and, occasionally, failure of the settlement negotiation altogether.

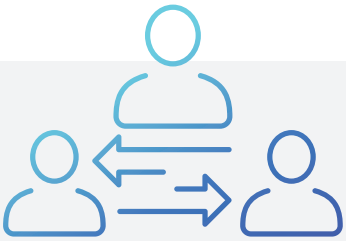
In civil practice in California, most cases are mediated at least once during the lifetime of a dispute. There are several reasons for this:

- Some disputes based on contract require mediation as a prerequisite to filing a lawsuit. Typically, the parties are the signatories to the contract; occasionally third parties may opt in to the prelitigation mediation.
- The courts are overwhelmed with cases. Once a lawsuit is filed, the parties are strongly encouraged by the courts to participate in some kind of alternative dispute resolution process in hopes of reducing the strain on scant court resources.
- The increasingly staggering cost of civil litigation (I like to call it the "sport of kings") gives many litigants pause for thought, making mediation an attractive and cost-effective option to try to stop the bleeding.
- Statistically, mediation is consistently effective: approximately 80% of civil cases go to mediation, and of those approximately 80% are resolved as a direct or indirect result of that process. Those numbers vary somewhat based on the kind of case being mediated.

Common Non-Monetary Issues Encountered in Mediation

There is a tendency to think about case resolution solely in terms of dollars and cents. How much money is the complaining party going to get? How much money is the responding party going to pay? How far can those expectations be stretched in either direction for the sake of reaching a settlement all parties can agree to? However, **nearly every mediation involves non-monetary issues that need to be addressed in order to reach resolution.** Here's a few examples:

- A party may need to negotiate the payment of a settlement over time.
- One or more of the parties may want to negotiate a confidentiality provision (see more on this below) or a non-disparagement clause.
- Settlement may be dependent on one or more of the settling parties seeking and obtaining a judicial determination of good faith under Civil Code section 877.6 if a global settlement is not reached.
- Settlement may need to be approved by a board of directors under its bylaws.
- One of the parties may insist that the other side cease and desist a certain kind of behavior.
- Settlement may be contingent upon one of the parties undertaking a training program, such as sensitivity training, or supplemental training on discrimination and harassment in the workplace.
- Certain kinds of settlements require court approval or approval by a third-party administrator.



Increasingly, a party requests that certain information posted on social media be taken down or retracted. I had a case where the plaintiff had posted a number of incendiary, unsubstantiated claims against the opposing party and the ongoing case on her social media page. Removal of those posts was part of the negotiated settlement.

Whatever the non-monetary issues are (one esteemed mediator, a retired Federal court magistrate, calls these the "oh, by the way" terms of settlement), it is imperative that they be negotiated and dealt with prior to reaching an agreement on dollars and cents. **You don't want to risk your settlement falling apart at the last minute because you "asked for something else" after a deal was reached in principle.**

Addressing Non-Monetary Terms Prior to Mediation

An elegant way to handle this situation is for the mediator to ask counsel for one of the parties to **prepare a draft Memorandum of Understanding (MOU) *a day or two before the mediation begins* and then circulate the MOU to all other counsel for review, comment or revision.** Even if your mediator does not request that you undertake this task, it is smart practice for counsel to adopt on their own to avoid any surprises in the "oh, by the ways" on the day of mediation.

Preparing the draft MOU in advance avoids surprises. Putting the time in to have this work done in the beginning saves time at the end. We have all been there: you finally reach agreement at the end of a long day of media-

tion and then the parties realize they don't have a written agreement to sign. Someone inevitably starts slogging away at one while the rest of the participants cancel their dinner reservations or reschedule their return flights. This exercise wastes time, and it is easy to make mistakes or forget a critical term when a MOU or quick settlement agreement is prepared under these circumstances.

You don't want to allow the parties to disband before you have a written agreement, enforceable in court under Code of Civil Procedure section 664.6, signed by all settling parties. In a case I mediated as a young attorney, the (very experienced) mediator let everyone go without a writing memorializing the settlement. One of the parties went home and armchair-quarterbacked the settlement negotiations with his family members, who, despite a lack of legal training or personal knowledge of what had transpired during the mediation, were able to convince this party that he had been taken advantage of and should have held out for more money. The "deal" fell apart, and we had to start all over again. That should never be allowed to happen.

Preparing a memorandum of understanding in advance also provides the practitioner and the client the opportunity to work together to explore the client's boundaries for settlement terms, provided an acceptable number can be reached. Many times, the MOU provides that the parties will prepare and sign a "long form" settlement agreement at a later time, but with the MOU in hand at least the parties have an enforceable written agreement when they leave the mediation.

A Word About Confidentiality Provisions in Settlement

One of the "extras" that is frequently requested, usually by the party paying all or part of a settlement, is a confidentiality provision. Fairly recent changes in California law merit a quick word about confidentiality provisions in certain kinds of civil lawsuits, although this issue invites far wider discussion and examination.

Briefly, California's "Silenced No More Act," Senate Bill 331, was codified as Code of Civil Procedure section 1001 and became law effective January 1, 2019, amended in 2021 and 2022. The current iteration of section 1001 prohibits the parties from entering into, or the courts from enforcing, a settlement and release agreement in which the complaining party is restricted from disclosing or

discussing (1) an act of sexual assault; (2) an act of sexual harassment; (3) an act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination; or (4) an act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination by the owner of a housing accommodation. It should be noted that section 1001 does not preclude a provision keeping the amount and terms of the settlement confidential.

It is also important to remember that any MOU or settlement agreement that prohibits one or more of the parties from reporting the particulars of the dispute to a consumer protection agency, for example the California Department of Real Estate, is void.

In conclusion, being prepared to address in advance the non-monetary terms of your settlement, whatever those are, ensures better use of your valuable time at mediation. This leads to the creation of agreements all parties and the courts can live with, making it a true win-win for everyone involved.

[1] This is true at least in the context of typical civil litigation involving personal injury, contract disputes, employment disputes, etc. Obviously, in mediations involving family court matters, mediation may be primarily concerned with child custody arrangements and similar matters.

JANE A. RHEINHEIMER

Jane Rheinheimer is an expert neutral with 33+ years' experience resolving employment and real-estate disputes with parties from diverse industries. With her top-of-the-line diplomacy and problem solving approach, Jane is passionate and committed to guiding her clients to resolution.

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