

## Readiness Checklist for Mediation:

### Eight Things In-House Counsel Should Discuss With Litigation Counsel Before Mediation

#### The Mediation Process

- What is the client's role in the mediation?
- Discuss whether the client will speak directly with mediator and/or the other party
- Discuss whether an apology to or from a party might be appropriate
- Discuss whether an opening presentation at mediation is desirable or appropriate
- Are there desirable non-monetary solutions, such as future business or payment in-kind?



#### Selecting a Mediator

- Discuss the desired education, experience, and background of your mediator. Is subject matter expertise really necessary, or are mediator skills more important?
- Describe how the mediator selection process works (if required by contract or otherwise)
- Determine whether an evaluative or facilitative mediator would be best for this case

#### How the Status of the Dispute Influences the Mediation Process

- Has suit/arbitration been filed?
  - How long will trial/arbitration take to reach a final resolution?
  - Have there been any continuances?
  - Is the tribunal likely to grant a request for a continuance, further delaying resolution?
- Are there pending dispositive motions before the court/arbitrator that create some risk?
  - How should that risk inform the client's decision-making?
  - Discuss an honest assessment of chances of success on the pending motion(s)
  - Discuss whether mediation is more or less likely to succeed with a motion pending or whether the parties should wait until after a decision is rendered
- Has the judge/arbitrator made any preliminary decision in the dispute?
  - Does the decision provide an early assessment of either the parties or their case?
  - How likely are the parties to overcome the early decision?
- What discovery needs to be completed?
  - Are all depositions completed?
  - Discuss an honest assessment of each party's performance as a witness and likely impact each will have on a decision by the judge, jury, or arbitrator
  - Are expert witnesses needed?
- Have the parties engaged in previous settlement discussions?
  - What are the impediments to settlement presently?
  - How can the mediator assist the parties to overcome these impediments?

#### The Impact of Opposing Counsel on the Case

- Discuss how opposing counsel presents in front of a tribunal and his/her likely impact on a decision
- Discuss how a mediator may assist the client in dealing with opposing counsel
- Discuss the opposing counsel's likely approach to the mediation

#### Settlement Authority

- Provide recommendation for a favorable settlement range (please avoid discussing a client's "bottom line" unless you want the client to "anchor" on that number and exhibit inflexibility to move beyond it at

mediation)

- Discuss the pros and cons of settlement at certain dollar ranges
- Discuss the best, worst, and most probably result for the client should the matter go to trial/arbitration
- Discuss the advantages of preparing a joint draft settlement agreement, leaving out the terms of consideration but fully negotiating the standard language. Having a prepared agreement gives the parties a better opportunity for a durable agreement that is binding, enforceable, effective, and final.

### **What are the Chances of Success at Trial or Arbitration?**

- Provide an honest assessment of the parties' claim(s), considering liability, damages, and defenses
- Discuss the likelihood that a trial will bring adverse publicity
- Discuss the risks of an adverse judgment, including:
  - The availability of adequate liability insurance
  - The availability of adequate funds or assets to satisfy a judgment
  - Whether a judgment jeopardizes the survival of a party's business, encouraging a bankruptcy filing

### **Anticipated Costs of Litigation or Arbitration**

- What is the likely cost to litigate to resolution (deposition costs, expert fees, attorney fees, etc.)?
  - The pre-trial costs
  - The cost to try the case
  - How much has the client spent to date on the litigation?
- Is there a right to appeal a decision by the court/arbitrator?
  - Whether an appeal is available only at the end of the case
  - What is the likelihood that either party will appeal should they lose at trial?
  - An estimate of the cost and time to complete an appeal
  - Whether the appeal is likely to result in re-trying the matter or a portion of it
- Cost and Fee-shifting
  - Are the parties subject to a cost or fee-shifting agreement, statute, offer of judgment, or rule?
  - The extent to which expert fees are recoverable (REMINDER: NRS 18.005 allows \$1,500 per expert, unless the court determines that "circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.")

### **The Practical Advantages of Mediation even if you don't Settle**

- "Free" discovery on important issues raised in support of the parties' positions
- Preview of any "smoking gun" that the other party thinks will win their case
- Testing the attitude of the other side and counsel
- Conducting an inventory of case weaknesses and how to overcome them
- Providing baseline information for an offer of judgment
- Testing the conviction of the parties regarding the strength of their case
- Strategic planning in the down time while the mediator is meeting with the other side
- Gauge how the parties, counsel, and their arguments are perceived by a neutral third party

