

MASTERS



RIBAKOFF

mediation • arbitration • investigation

CAN TECHNOLOGY REPLACE PHYSICAL PRESENCE AT MEDIATION?

Introduction

Careful thought typically goes into decisions regarding who participates in mediation. The presence of certain individuals can often enhance prospects for resolution, however, presence of others can actually hinder progress towards settlement. An assumption frequently articulated to mediators is that primary decision makers must always be physically present for a mediation to be successful. Several recent mediations have caused me to question this assumption and to consider whether the existence of technology, such as Skype, Facetime, and the like might inform our thoughts about who can participate in mediation and allow us to conduct mediations in new and different ways.

In this era of packed schedules and reduced travel budgets, insistence on the physical presence of everyone involved may result in unwanted delays and scheduling nightmares for the case managers and assistants charged with the logistics of coordinating the calendars of a busy mediator, several sets of parties, lawyers, and various individuals from various geographical locations. We now have options if it is not optimum or feasible for certain parties, key witnesses, ultimate decision-makers, or carrier representatives to be physically present at a mediation.

Who and What Determine the Participants at Mediation?

A mediation is not a Mandatory Settlement Conference, subject to the requirements of California Rule of Court 3.894(a)(1) and (2) and LASC Rule 3.25. Unlike judges, a mediator has no power to insist on the presence or absence of any individual and must defer to counsel's decisions in this regard. That said, the decision is not one to be made lightly or by rote; it should certainly not be left at the hands of an assistant or a case manager.

The determination of who needs to be physically present at mediation requires thoughtful consideration, and often should be discussed with the mediator, for her/his input and guidance. Such discussions need to be had sufficiently in advance of a mediation date so that travel arrangements and /or time zone differences will not be insurmountable. At times, I may suggest that counsel meet and confer among themselves, or with me, to discuss concerns and to determine what will be most productive.

While it is true that certain individuals, e.g. the aggrieved or accused individual(s), an insurance carrier representative, or company owner are essential to reaching a binding resolution, as with any rule, there are exceptions. Consider the following scenarios.

Aggrieved Individuals

In a recent case, the plaintiff was a former employee who alleged that she had been discriminated against when she was terminated shortly after announcing her pregnancy. A lawsuit was filed, and a mediation date was agreed upon. However, the plaintiff had relocated after her termination and having just given birth was unable to travel until long after the court ordered mediation completion date. Rather than delay resolution, her lawyer suggested in setting the date, that plaintiff would participate via telephone. The company was concerned she would not be fully invested in the process. I held lengthy pre-mediation conference calls with both sides and ultimately arranged to have plaintiff participate via Skype which would be set up on a large screen in my mediation offices where her counsel, defense counsel, and company representatives would be physically present.

At the start of the mediation, I held a joint session to discuss how the day would go, and then I separated the parties. Plaintiff fully participated throughout the day. When she wished to talk separately with her counsel, I stepped out of the room. She took breaks to nurse her new born baby, just as she would have if she were able to travel to the mediation site. When we reached resolution, a settlement agreement was sent to her, which she executed and returned via facsimile. I held another joint session to close the day and to thank the participants for their hard work. Everyone was quite satisfied with the result and the process.

Individually Named Defendants

The determination of whether individually named defendants should be present at mediation is nuanced and multi-layered. In most instances, the interests of an individually named defendant are not aligned with the corporate defendant, who may have reasons for not wanting that person present, e.g. they may hinder settlement even though usually s/he will not participate in any settlement payment and/or they may not present well. Yet an individually named defendant has a right to be present at a mediation in which his/her interests are affected. Technology can often help to meet the needs of everyone involved.

In a highly charged sexual harassment case, plaintiff had accused her former employer and a senior executive of sexual harassment. She had also brought criminal charges of a violent rape against the executive and had obtained a TRO and later a preliminary injunction against him prohibiting him from coming within 100 yards of her. After he was acquitted of criminal wrongdoing, the parties agreed to participate in mediation. Plaintiff was quite fearful of having the accused individual physically present at the mediation, while the executive's private attorney insisted he had a right to be present and was essential to reaching resolution. The Company's counsel did not feel his presence would be helpful given his volatile emotions. This issue surfaced during pre-mediation calls with me and I arranged for his virtual presence via Skype in private caucus with his attorney and me. This enabled the plaintiff to participate in the mediation

without concern for her physical safety, or indeed, even seeing him. The accused was able to participate without violating the preliminary injunction.

High Ranking Executives

The presence or absence of a high ranking company executive with decisionmaking authority can affect a mediation in several ways. It is not uncommon for a plaintiff to insist that a high ranking executive must attend the mediation in person, in order for them to feel that the matter is being taken seriously and that “real money” will be on the table. On the other hand, such executives often have legitimate reasons for not attending a mediation, such the press of an extremely busy calendar of work and heavy travel commitments. Even the busiest executive can usually find time for some level of participation if the reasons therefore are adequately explained. This issue is something to be discussed with the mediator in advance.

Frequently it is enough that executives participate via telephone or Skype, especially in connection with final approval of an offer or demand. In other cases I have mediated, more in depth participation of senior executives clinched the deal. In one matter three African American women had complained about inappropriate race discrimination to the Executive Vice President of their international employer; shortly thereafter there was a reorganization and the women were terminated. They were about to sue for retaliatory termination. The EVP agreed to participate via Sykpe from his home office in England. Plaintiffs felt that he had demonstrated appropriate accountability and serious commitment even if his schedule did not allow for his physical presence, and were able to reach resolution,

In another case involving a then current African-American employee who felt his Filipina supervisors and co-workers were not respecting him; litigation was threatened in a demand letter. During separate pre-mediation conferences with counsel for the employee and for the company, I came to believe that in order to settle this case, the employee needed “to be heard”; his counsel concurred. I then suggested that the CEO of the company attend at least part of the mediation day and counsel and the CEO agreed. It was next decided among counsel that the employee and the CEO of the company would address each other in a joint session.

On the day of the mediation, I spent time with each side, exploring what was to be said and coaching both the employee and the CEO on how to listen and convey their thoughts before we held the joint session. It was one of the most moving exchange of feelings that I have ever facilitated and witnessed. Of course, this is not the norm in mediation. I do not think that this could have matter settled with the CEO participating remotely. I attribute the success of this mediation primarily to the professionalism demonstrated by counsel who trusted in the process and the willingness of the two men to listen to each other.

Insurance Carrier Representatives

Recently I have had several pre-mediation conferences in which the issue of insurance coverage is raised, with plaintiffs insisting on the physical presence of a carrier representative and defendants insisting that it is not necessary. As with every employment case, each case must be evaluated on its merits, which includes ascertaining whether there is a potentially applicable policy, if the matter has been tendered, if the retention or deductible has been met, whether there

is a dispute or conflict between the insured and the carrier, and various other coverage issues. Again pre-mediation conferences are crucial to identify potential participants and the rationale for inclusion or exclusion.

Frequently the existence of coverage has not been determined at the time a mediation date is set. By the time the coverage issues are resolved, it may be too late to allow the carrier representative to free his/her schedule and make travel arrangements to attend. However, in my experience, carrier representatives/decision makers can effectively participate in a mediation session without being physically present. In one recent case in which there was a significant disagreement between the insured and the carrier regarding coverage and whether the matter should settle, I insisted that the carrier representative and coverage counsel appear in person at the mediation.

I generally request that I be able to speak directly to a carrier representative during the mediation and most experienced counsel will arrange for me to do so, either via phone, videoconference, or Skype. At a minimum, I insist on a commitment from counsel that the carrier representative will be available by telephone, if more authority becomes necessary, and that we will have that individual's cell and home telephone numbers in case the mediation is lengthy and the carrier representative in another time zone.

Other Possible Participants

If there is a pending worker's compensation claim, it is important to consider whether the worker's compensation will be negotiated along with a civil claim. An intention to negotiate a global resolution is something that needs to be disclosed early to the mediator, or the mediation will not be successful. Early involvement of the worker's compensation attorneys will help clarify many issues, including whether the claim is ripe for resolution, whether the claimant has been declared "permanent and stationery", whether the doctors' reports necessary to enable an informed decision have been received, and whether the carrier is on board with appropriate authority.

I recently mediated a case where the parties had decided to seek a global resolution; the resolution of the civil claims was conditioned upon settlement of the worker's compensation claims and approval from the Workers Compensation Appeals Board. Many worker's comp attorneys are not accustomed to the typical employment mediation, which generally take all day, and the two worker's comp attorneys were not willing to commit to participate in person. It was agreed that they would negotiate via telephone during the day of the mediation and to report in periodically to me. They had already tentatively agreed on the value and terms of that part of the settlement when we reached agreed on the civil matter. It was easy for counsel to proceed to put the required documentation together and to assign responsibilities for seeking WCAB approval and for notifying the court that settlement had been agreed upon.

Increasingly, I am encountering cases in which bankruptcy, either of the employee or of the employer, becomes at issue. Determination of who will participate is crucial, given that any settlement will require the approval of the bankruptcy Court.

Shortly before the mediation date in a sexual harassment case, defense counsel discovered that plaintiff had not disclosed the existence of her FEHA claim in her pending

bankruptcy proceeding. Defendant intended to file a motion to dismiss the case for lack of standing and so notified plaintiff. When I was informed of the situation during my pre-mediation calls with counsel, I suggested that before expending the time and money on seeking dismissal, we simply involve the bankruptcy trustee. The trustee agreed to continue with plaintiff's chosen counsel and was quickly substituted as plaintiff in the sex harassment case. The trustee could not re-arrange her calendar at the last moment, but participated throughout the mediation via telephone and email. Ultimately resolution was reached, subject to the approval of the bankruptcy court.

What Technology is Available?

There are a number of communication devices to consider.¹ Videoconferencing used to be popular but it had its draw backs. The participants were required to go into an office with a videoconferencing system set up, which might not be geographically convenient; often the video was limited, cumbersome, and expensive. Skype seems to be increasingly popular and easy to use. Many individuals and companies already have it set up on their computers. My experience has been with Skype, but various colleagues suggest that WebEx has less security breaches. Others recommend FaceTime, Join Me, Citrix or Oovoo. Most mediators are able to accommodate the wishes of counsel as to which technology to select.

Conclusion

Busy calendars, interrupted travel plans and/or time zone differences do not need to prevent settlement. Effective participation can be accomplished either in person or using technology. Whatever is decided, it is important to identify the appropriate attendees well in advance of the mediation. It is also important that any use of technology must be tested in advance to avoid last minute glitches on the day of mediation.

¹ On-line mediation is beyond the experience of this mediator, and hence also beyond the scope of this article.