

# Getting the Most From Your Mediation

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## PRE-MEDIATION:

- ❖ Timing of Mediation
  - What do you need to know to have a successful mediation?
    - Key depositions, written discovery?
    - Employment: Insurance? Ask early!
    - PI: Medical liens? IME completed? Experts needed?
  - Who needs to attend?/Are they available?
  - Leverage points/Risk—procedural deadlines, motions (MSJ, CMC, etc.)
  
- ❖ Prepare and Exchange Mediation Statements
  - The earlier the better (particularly when insurers are involved)
  - Write for your audience: The Other Side (not the mediator)
  - Make it easy to find your evidence
  - Include opening demand/offer
  - Confidential side letter to mediator with TRULY confidential information
  
- ❖ Communicate with Your Mediator (call informally, if not scheduled)
  - Discuss optimal process (joint procedural and/or substantive session?)
    - Will substantive presentations be helpful? Timing?
      - Opportunities
      - Risks (and how to manage them)
  - Help your mediator help you
    - Communicate theme of your case
    - Confirm key decision-makers will be attending mediation
    - Discuss mediation goals
    - Discuss potential problem areas
  - What do you and your client need most from the mediator?
  - Convey what type of mediator will be most helpful in this case (*eg* facilitative, evaluative, transformative, combination)
  - Share helpful information that will NOT be in your brief

- ❖ Prepare your client
  - Explain mediation process, confidentiality and negotiation dance
  - Note: Proposed legislative exceptions to mediation confidentiality for malpractice
  - Practice joint session presentations to put client at ease
  - Help client prioritize interests (sometimes mediators can help with this)
  - Come with negotiation strategy, and flexibility

### **DURING MEDIATION:**

- ❖ Joint session
  - Timing of any joint session (beginning, middle, end, flexible?)
  - Making a joint session valuable
    - Be confident in position, but open to information
    - Show respect to people and to the process
    - Rein in your zealous advocate
- ❖ Caucusing (Separate Sessions)
  - Key Principles
    - Give the mediator strong arguments to promote your case
    - Convey demands/offers with compelling explanations, analysis and meaning
    - Beware of misrepresenting or exaggerating--credibility is key
  - Effective Negotiation Tips
    - Keep focused on your negotiating plan, but flexible to new options
    - Avoid retaliating in response to disappointing demands/offers
    - Include your client fully in the negotiating process
    - Avoid drawing lines in the sand
  - Impasse (and overcoming impasse) is a common part of the negotiation cycle
    - Shift to non-monetary issues
    - Propose ranges
    - Explore mediator's proposal
      - Advantages
      - Risks
    - Persevere – Gap is often smaller than you think

### **AFTER THE MEDIATION:**

- ❖ If a Settlement is Reached
  - Are all issues resolved? If not, is a plan in place to address unresolved items?
  - Pre-prepare and Execute Settlement Agreement at Session
- ❖ If a Settlement is Not Reached
  - Discuss follow-up needs and timing with mediator
  - Keep your mediator in the loop!

## Mediation Confidentiality Update:

### Tentative Recommendation for Exception for Attorney Malpractice

The California Law Revision Commission (CLRC) was asked by the legislature to propose a new mediation confidentiality exception to address attorney malpractice and other misconduct. In June 2017 the CLRC released for public comment its Tentative Recommendation of the Law Revision Commission with respect to Study K-402, Mediation Confidentiality. In general, the proposed new Evidence Code 1120.5 would create a mediation confidentiality exception for mediation-related communications when relevant to a lawsuit or fee dispute to prove or disprove an allegation of legal malpractice during a mediation or mediation consultation. (*See link below: CLRC Study K-402, September 27, 2017, Staff Memorandum 2017-52, pages 2-5.*)

Since the release of the Tentative Recommendation for public comment, stakeholder organizations and individuals have weighed in with more opposition than support (*see CLRC Staff Memorandum 2017-52, pages 6-14*). As of its last meeting on September 28, 2017, the CLRC directed its staff to explore the possibility of narrowing the proposed exception, but rejected a proposal to have the exception apply only to attorney-client discussions that occur in private in a mediation context. (*See link below: CLRC Minutes of September 28, 2017 (Draft), Memorandum 2017-47, page 5.*)

#### California Law Revision Commission Links:

<p>September 27, 2017            CLRC Memorandum 2017-52, Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Analysis of Comments on Tentative Recommendation)</p>	<p>Download:  <a href="http://www.clrc.ca.gov/pub/2017/MM17-52.pdf">http://www.clrc.ca.gov/pub/2017/MM17-52.pdf</a></p>
<p>CLRC Memorandum 2017-47. Minutes of Meeting on September 28, 2017 (Draft)</p>	<p>Download:  <a href="http://www.clrc.ca.gov/pub/2017/MM17-47.pdf">http://www.clrc.ca.gov/pub/2017/MM17-47.pdf</a></p>

Attorneys will want to keep abreast of developments regarding this proposed exception to mediation confidentiality. In addition, the Law Revision Commission has been particularly interested in hearing from attorneys (as opposed to mediators) on this issue.



**Patricia Prince** has provided private dispute resolution services through her firm, Prince Law & Mediation, since 2001, specializing in the mediated resolution of business and employment disputes. She has successfully mediated to resolution hundreds of employment disputes, including employment discrimination, harassment, retaliation, wrongful termination and wage and hour cases. She is known for her skill in mediating difficult, high-conflict cases, and for her ability to move parties from impasse to agreement. She handles class and other representative actions, as well as individual employment

cases. Ms. Prince also mediates a wide variety of business disputes, including partnership dissolution; intellectual property disputes; business torts such as breach of fiduciary duty, fraud, unfair business practices, and misappropriation of trade secrets; breach of contract; commercial landlord/tenant disputes; premises liability cases; and trust and estate disputes. She is active in the legal and ADR communities, including having served as President of The Mediation Society and Chair of the Marin County Bar Association ADR Section, as well as Co-Chair of the MCBA Labor & Employment Law Section. Ms. Prince is fluent in Spanish and is frequently retained to mediate cases with mono-lingual Spanish-speaking parties or for cases in which multi-cultural issues may be part of the dispute. For more information see <http://princemediation.com/>.



**Susan Feder** is a full time mediator affiliated with JUDICATE WEST. She uses insight and intuition to bring a fresh and creative approach to reaching settlement. Based on her former litigation experience, Susan's mediation practice covers several substantive areas. She has successfully resolved hundreds of personal injury cases involving auto, bicycle and motorcycle accidents, product defects, premises liability and medical and dental professional negligence. Her practice also includes real estate litigation in the areas of non-disclosure and construction

defect. In addition, Susan has successfully mediated numerous corporate and banking cases drawing on her in-house litigation experience with Bank of America in San Francisco, and her corporate litigation background with Paul Hastings in Los Angeles. Susan is an active participant in the legal and ADR community, and is a board member of the Marin County Bar Association and The Mediation Society. She assists the Courts in San Francisco and Marin as a Settlement Conference Officer. Susan is the current chair of the MCBA's ADR section, and is a member of the Sangster Inns of Court, California and Marin County Women Lawyers, and the Bar Association of San Francisco. She works with BASF to help mediate disputes with the SF Unified School District, as well as to resolve fee disputes through mediation. Susan is fluent in French, conversant in Spanish, and mediates throughout California. For more information, see <https://www.susanfedermediation.com>