



MEDIATING THE HATFIELD – MCCOY DISPUTE

MARIPOSA COUNTY BAR APRIL 2020 MEETING

- I. PREPARATION, PREPARATION AND MORE PREPARATION
 - a. PERFECT UNDERSTANDING OF TRUTH
 - i. WHY WE SETTLE ON THE COURTHOUSE STEPS
 - b. PUSH – PULL BETWEEN BEING 100% PREPARED V. THE COST IN ATTORNEYS FEES IN GETTING THERE.
- II. FACTORS TO CONSIDER PRE-MEDIATION
 - a. YOUR PERSONAL BIAS AND THE PERSONAL BIAS OF THE OPPOSING PARTY
 - b. SET REALISTIC GOALS WITH CLIENTS.
 - i. DISPEL UNREALISTIC EXPECTATIONS AS MUCH AS POSSIBLE.
 - ii. THIS IS ONE OF THE BIGGEST IMPEDEMENTS TO RESOLVING CASES, UNREALISTIC EXPECTATIONS.
 - c. CASES ARE HARD TO SETTLE WHEN THE OTHER SIDE OF THE CASE IS EVIL. ALTERNATIVELY, CASES ARE EASIER TO SETTLE WHEN THE OTHER SIDE IS GOOD.
 - i. TRY TO REFRAME ADVERSE PARTY AS GOOD OR AT LEAST BETTER.
 1. ELDERLY MAN HIT IN A CROSS WALK. NEGLIGENT DRIVER TAKES MAN TO HOSPITAL IN HIS OWN CAR.
 - d. CONSIDER ALTERNATES TO THE EXPECTED CASH SETTLEMENT. CONSIDER THESE ISSUES PRE MEDIATION
 - i. CONSIDER OTHER CONTINUING BUSINESS RELATIONSHIPS TO RESOLVE A DISPUTE.
 1. CONCRETE COMPANY AGREES TO EXTRA \$1.00 PER YARD FOR CONCRETE UNTIL CONCRETE CONTRACTOR PAYS HIS BILL.

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III. CONFIDENTIALITY DISCLOSURE IN MEDIATION

IV. INITIAL CONTACT PRIOR TO MEDIATION.

- a. BASED UPON THE SIZE AND COMPLEXITY OF THE CASE.
- b. OTHER MEDIATORS ALWAYS CALL

V. CONDUCT AT THE MEDIATION.

- a. JOINT SESSION V. PRIVATE CAUCUS.
 - i. REASON FOR JOINT SESSION.
 1. COMPLEX MATERIAL CAN BE COMMUNICATED FASTER
 2. ALLOW THE PARTIES TO INTERACT WITH EACH OTHER
 3. MANY MEDIATIONS START AS POLAR OPPOSITES
 - a. SOMETIMES, PRIVATE SESSIONS RESULT IN TWO SEPARATE MEDIATIONS GOING ON IN EACH ROOM. JOINT SESSION ELIMINATES THAT.
 - ii. REASON FOR PRIVATE SESSIONS
 1. MORE COMFORTABLE FOR THE PARTIES, (GOOD AND BAD)
 2. UNEQUAL BARGAINING POSITIONS.
- b. WHEN TO APOLOGIZE.
 1. FULL AND COMPLETE APOLOGIES WORK
 2. INSINCERE APOLOGY MAY BACKFIRE
 3. WAR STORY WHEN APOLOGY WORKED.
- c. USING A MEDIATOR FOR WHAT IS TRULY IMPORTANT.
 1. WAR STORY. ELDERLY COUPLE.

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d. CONDUCT WHEN OFFERS ARE MADE

1. ANCHORING
2. I DON'T LIKE THE OFFER, BECAUSE THE OTHER SIDE MADE IT.
3. RISK AVERSION
4. TRY TO TIE OFFERS TO SOMETHING. TRY NOT TO USE EVEN NUMBERS, SUCH AS 10,000 OR 100,000.

e. JOINT MEETING WITH ONLY ATTORNEYS PRESENT

f. JOINT MEETING WITH PARTIES, WITHOUT ATTORNEYS PRESENT.

1. NOT USED UNLESS THERE IS AN ONGOING RELATIONSHIP BETWEEN THE TWO. CUSTOMER AND VENDOR, ETC.

g. MEDIATOR'S PROPOSAL

1. DISCUSSION OF WHAT IT IS
2. HOW IT WORKS
3. WHY IT WORKS.

h. WHAT TO DO IF SETTLEMENT IS ACHIEVED.

1. NORMALLY MEDIATORS BRING A SETTLEMENT AGREEMENT PRE-PREPARED.
2. I RECOMMEND THAT PARTIES PRE-CIRCULATE A SETTLEMENT AGREEMENT WITH ALL RELEVANT LANGUAGES TO ADDRESS PRIOR.
 - a. CONFIDENTIALITY
 - b. LIQUIDATED DAMAGES
 - c. NO DISPARAGEMENT CLAUSES

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- i. DON'T WALK OUT OF THE ROOM UNLESS AND UNTIL YOU HAVE A SIGNED AND ENFORCABLE SETTLEMENT AGREEMENT.
 - a. BUYERS REMORSE OCCURS THE NEXT DAY. IF NO SETTLEMENT AGREEMENT IS SIGNED, NO ENFORCABLE SETTLEMENT AGREEMENT.

- j. CONCLUSION

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