HAPLESS HARVEST

MEDIATION

PRE-PRELIMINARY CONFERENCE

Plaintiff's Counsel Information
In Preparation for Preliminary Conference with Mediator

Your perspective and earlier analysis of this case are summarized in the document titled: "General and Confidential Information for Plaintiff's Counsel."

You and the defense lawyer made a brief and futile effort at direct negotiations to settle the case. It's fair to say that did not go well. By the end, you were only able to agree upon trying mediation, and to work through the City Bar Association (CBA) mediation panel process. Based upon the type of case, the CBA administrator suggested three possible mediators; all had good reputations. You had some preference for one of those mediators because they had had an unusually balanced practice – some plaintiff's and some defense work – and had also taught tort law from time to time. You had also heard from a colleague that this mediator was good at establishing a rapport with the parties. You expressed this preference and were pleased that defense counsel had no problem with it.

Once the CBA confirmed the appointment and conflict check, the mediator contacted you and opposing counsel via email to set up a preliminary conference.

In his email, the mediator mentioned that the CBA had provided him with a copy of the complaint and answer filed in the case (filed approximately nine months ago). Thus, he is familiar with the central issues in the litigation.

What the mediator does not know at this point is just how difficult your attempted negotiations with opposing counsel were and how little progress was made. The complaint you filed was intended to signal that this case is a consequential one; that's why it prayer for relief seeks a round $1 million in medical and other expenses, lost income, damages for pain and suffering, loss of income earning capacity, and loss of quality of life and future enjoyment. Opposing counsel was downright disrespectful to you from the first moment of the negotiation, saying "So, in what universe is a slip-and-fall a million-dollar case? Not in any universe I know. These negotiations have to be in a reality zone or it's not worth my time." You thought he was arrogant and borderline insulting when, in a mocking tone, said that the only reality here is that Mr. Hapless hurt his knee – "all that pain and yet no break, not even a torn ligament." When you asked for an offer, he refused because: "Oh come on, you know that the plaintiff is asking for money so it's your job to ask for a number." You responded that the complaint spoke for you, in black and white, that you were seeking a million dollars.

He responded by saying: "That's ridiculous – it's funny money. I can't respond to that, I need an honest signal from you, and true statement of whether your client is a reasonable reality zone."

You were annoyed: how dare he suggest any lack of honesty your dealings as an attorney? And what right does he have to demand information about your client's negotiating position? Calling the complaint "ridiculous" was flip and in appropriate.

You quickly reminded him that there's an attorney client privilege; your obligation is to represent your client, not to "honestly" tell opposing counsel about your client's views on the negotiation.

You don't remember his exact words, but shortly after that he said something about getting paid by the hour for his time and being willing to wait and litigate. At some other point, he mentioned, "this slip and fall isn't much of a risk for my client, though it sure is for you and Mr. Hapless."

Not surprisingly, the negotiations did not get far. You indicated that you and your client would be willing to settle the case for much less than a million dollars, but that there would have to be fair compensation for Mr. Hapless' back and knee injury – his lost salary, medical expenses, and some allowance for lost income potential and your client's pain. He responded by saying this was a nuisance value case, that at most it was a simple knee injury. He also said that a quick trip back to law school would confirm that they would knock it out on summary judgment.

Frankly, you were glad the interaction was over, and that in the future the mediator would be a buffer between you. You want to minimize direct dealings with this guy. You know your client would feel the same way, and more so.

Prepare for your preliminary conference with the mediator. You understand that the mediator will use it as an opportunity to "meet" both attorneys, to get a sense of prior negotiations, and the issues in dispute that are dividing you.