LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

THURSDAY, JULY 17, 2025

Mediating against public entities: A bird in the hand

Mediating claims against public entities involves complex and often time-consuming procedures, but with patience and preparation, a negotiated settlement offers greater certainty and fewer risks than trial.

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We all know the benefits of mediating disputes. Parties have control over their own destinies, the process is faster than trial and its aftermath and it provides closure for the parties. Resolution is final; there is no chance of appeal. It's an opportunity for both sides to put a difficult issue behind and move forward.

Recent times have seen a rise in impressive plaintiff verdicts, with big awards against public entities often front-page news. But there are no guarantees of a favorable outcome for either side. The end result, coupled with the emotional and financial burdens of trial, may not always be the best outcome for either party. Verdicts can be appealed, reduced or even overturned, and the final result might end up significantly different from what is on the table at mediation. Is the gamble worth taking? For some cases, a jury trial is absolutely required to resolve the matter, but for the overwhelming majority of cases, mediation should at least be attempted before trial.

Mediating the public entity case is, however, far different than mediating with a private sector party. Disputes against public entity defendants pose unique challenges in the steps required before, during and after mediation. When the defendant is a public entity, there may be no insurance policy limits or other restrictive conditions on the potential settlement amount, but plaintiffs should be aware that mediating such cases will be a far cry from negotiating with private sector defendants. As long as they understand the exhaustive processes involved when public entities are in the picture, there should be little frustration or confusion as the parties work toward a productive mediation.

Public entities, including the state, counties, cities and other quasi-governmental entities or municipalities, are not created equal. This article is not intended to capture all public entity processes but to inform the reader of the general complexities involved for these entities, both in obtaining settlement authority to allow for an effective mediation and for the steps afterwards if the matter settles.

Before mediation

For a mediation to be successful, the parties, their representatives and their counsel must all appreciate the settlement value and potential verdict value of the case early in the mediation. There may be a vast difference of opinion as to those values, but because settlement authority must be obtained before public entities can negotiate, it will not benefit a plaintiff to provide new crucial information during the mediation. Public defendants typically have less flexibility to shift gears during mediation than private defendants; therefore, it is best to ensure that important discovery has been completed before the scheduled mediation date.

As with most government-related things, the process for obtaining settlement authority is time-consuming and involves multiple levels of approval, typically within legal and then from other stakeholders. Most mediation approval processes for public entities require the handling attorney to provide a detailed analysis regarding liability, damages and potential verdict value, as well as the recommended amount of settlement, well in advance of the mediation. This could mean months before mediation can occur.

For the state, the handling attorney's analysis goes up a "chain of command" within legal for settlement approval authority. The chain can include several levels within the legal hierarchy, with multiple individuals reviewing the request for authority, and it may require meetings or revisions before approval is obtained so that the matter can move on to the next step of the process. Different types of cases follow different processes; employment and tort matters, for example, can have completely separate steps for settlement authority.

The next step in the process might include risk management, the de-

partment's or agency's legal counsel, its director's approval and — depending on the level of authority requested — the Governor's Office. To compound matters further, if approval is required from the state legislature, the timing of a legislative session may become a factor. For these reasons, it could take several months after a request for authority has been submitted before a matter is ripe for mediation.

Claims against city or county entities will have different thresholds and timelines for obtaining approval, depending on the size of the entity and the level of authority requested. They will also invoke similar processes, with many levels participating in the approval process, with the ultimate approval usually coming from a City Council or Board of Supervisors. As with state matters, delays may result from the need to get settlement approval on an approving body's agenda, and factoring in when that body is in session. Some cities and counties operate with a risk-sharing group or involve the traditional insurance world, adding yet another layer of decision makers when Self Insured Retention (SIR) limits are exhausted.

For all of these reasons, it is imperative that comprehensive discovery be completed prior to mediation. If important new information is introduced for the first time at mediation, the public entity defendant may need the case to be re-evaluated, which could entail going back to step one of the authority approval process. For plaintiffs eager to settle their cases and move forward, this can be extremely frustrating.

Plaintiffs and counsel may not appreciate the time required to obtain settlement authority for public entities, the constraints on public defendants while in the mediation process or the time required if a matter is settled in mediation. Counsel should learn as much as possible about the processes applicable to a named defendant and set client expectations accordingly.

During mediation

Unless those representing the public entity defendant have the proper authority to settle the claim for a specific amount, there is little a mediator can do to move the parties toward resolution. They may be able to share information and evaluate the strengths and weaknesses of claims, but it would be a fool's errand to go down the monetary path without proper settlement authority.

Larger public entity defendants will typically be represented by city attorneys, county counsel, deputy attorneys or deputy attorneys general. Other public entities will be represented by experienced private law firm attorneys. When there is a public entity insurer, there will be an additional layer of processes and approvals, and a representative of the insurer will also be present. In such cases, the negotiation process may be more streamlined, similar to a settlement between private parties.

Because of transparency in government requirements under state law, there can be no confidentiality requirements in settlement agreements with public entities. In fact, the public may have access to certain settlement documents through the Public Records Act. There can also be no "gift" of public funds in any negotiated settlement agreements. This means that public entity defendants cannot ask for additional monetary amounts during mediation just to get the matter settled, in excess of previously approved authority. In employment cases, pensions, service time and other issues cannot be a part of the negotiations.

A call to risk management, the home office of an insurance company or a corporate representative asking for more authority during the mediation does not typically exist in the public entity world. Additionally, non-monetary consideration as part of a negotiated mediation settlement, such as building a memorial on the side of a highway where a victim died or a bench in honor of a plaintiff or another person typically cannot be part of a settlement.

If the case settles at mediation, public entity counsel may not be able to sign an agreement that provides a definitive payment date or even amount of settlement if the approving body has not yet approved it. Typically, the agreement will reflect only that legal counsel will recommend the negotiated amount, but it is not settled until officially approved.

After mediation

Congratulations! You settled your case at mediation. Now the case is over — right? Not necessarily. Depending on the settlement amount and the entity's internal payment process, there may still be months of waiting. Most non-state entities tend to follow the payment timeframes of private defendants — approximately 30 days after all paperwork is submitted post-mediation (yet another process).

But if the state is involved, it could be months before the State Controller's office can issue payment. In one case that my former office handled, the matter was settled "in principle" in January of the year it went to mediation. The mediator and counsel — all experienced professionals — understood that the negotiated amount would be recommended by legal but unless and until approved by the legislature, it was not a done deal. With multiple levels of approval required and a wait for the next legislative session, the plaintiff did not receive payment until November. While this is certainly an exception, it highlights the patience needed for receiving payment from the government.

Whenever a public entity is part of the mediation, plaintiffs and counsel should understand that there may be delay in concluding the matter. Despite this inconvenience, there has historically been no risk of nonpayment of an approved settlement. Budget issues may, however, affect timing of the payment. Even with the longer timeframes, there should be considerable comfort in knowing that payment is on the way.

In contrast, a jury verdict could be overturned, remanded or substantially reduced on appeal, and the process could take years to play out. Even an unchallenged judgment against the state or other public entity could be significantly delayed if that entity asks the court to extend payment — along with interest — up to 10 years pursuant to Government Code Section 984. This tool is not used often by public entities, but it exists.

Conclusion

Mediations involving public entities may involve unique hurdles and considerable time, but if parties understand these challenges in advance of mediation, they should be able to navigate the process with realistic expectations. For those not aware of the activity going on behind the scenes, with public entity counsel trying to get approval for authority, it may seem as if the defense is dragging its heels before going to mediation. The prior discussion should clarify that significant hurdles must be overcome to ensure a successful mediation and resolution of the matter.

A bird in the hand may be worth far more than its actual weight. A mediated settlement is a sure thing. Yes, the process may be slow in terms of when the case is ripe for mediation with a public entity, but it is certainly speedier than a courtroom trial. Payment may not be immediate, but it will be made. When plaintiffs and counsel understand the unique challenges and learn to be patient, mediation can offer both sides the best possible solution for claims against public entities.

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