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Challenges of mediating against public entities

A MEDIATED SETTLEMENT WITH A PUBLIC ENTITY SHOULD BE A SURE THING

When a legal claim involves a public entity such as the state of California or one of its 58 counties or hundreds of cities, the entire process will be different than when an individual or private entity is the defendant. From the requirement of filing a government claim pre-litigation to mediating a case before trial, these cases are subject to special requirements and unique bureaucratic hurdles.

Settling legal disputes outside the courtroom should be far simpler than going to trial, but agreements to resolve a case with a public entity can require additional layers of processes. From the need for specific information to evaluate a claim to the hurdles of obtaining settlement authority, the process can include multiple layers – risk management, agency legal counsel, city council or school or county boards, the governor's office, or even the state legislature – and all of this can significantly delay resolution.

So, how do you navigate the mediation process in order to bypass the courtroom and obtain closure and certainty for your client?

Mediation fundamentals with a public entity

Everyone understands the benefits of mediating disputes. Parties control the outcome, the process is confidential and much faster than trial, and the result is not subject to appeal. Trials have inherent risk, with no guarantee of a favorable – or even final – result. When faced with this risk, as well as the emotional and financial burdens of trial, most parties will opt for giving mediation a try before submitting the dispute before a judge or jury.

And why not? The time and expense involved in mediating a controversy pale in comparison to that of trial. Further, even if a case does not resolve at mediation or shortly thereafter, the process itself often gets the parties closer to where they want to end up, and it can shed light on the opposing parties' position.

But mediating the public-entity case is different than mediating with a private-sector party. Disputes against public-entity defendants involve a series of required steps before, during and after mediation. Depending on the public entity, there may be self-insured retention issues, or there may be no insurance policy limits or other restrictive conditions on the potential settlement amount. In either event, mediating such cases will be a far cry from negotiating with private-sector defendants.

Public entities, including the state, counties, cities, and other quasi-governmental entities or municipalities, are not created equal. As long as parties and counsel understand the exhaustive processes involved when public entities are in the picture, and that is communicated to the parties, there should be less frustration and confusion as they work toward a productive resolution.

Filing the mandatory statutory claim

Although public entities are generally subject to broad immunities, the government can be held legally responsible for personal injury damages in certain situations, including injuries resulting from the negligent acts of employees and independent contractors, dangerous conditions on government property, and a public entity's failure to carry out a duty imposed by law. (Gov. Code, § 815.) Over the years, courts have broadened these exceptions by reading immunity narrowly and the exceptions broadly.

The act

The California Government Claims Act (Gov. Code, §§ 810–996.6) (formerly known as the Tort Claims Act) was enacted to allow government agencies to investigate and potentially settle all such claims without litigation. The law spells out the procedures that must be followed when filing a claim for money or damages against a governmental entity in the state of California, including state, county, and local entities, as well as their employees.

Individuals are required to file a formal, written claim with state or local government entities before filing any lawsuit for money damages or personal injury. When applicable, the claimant must use the specific claim form provided by the entity or must draft the written claim in a format that provides the required details.

Claims for personal injury or property damage must be filed within six months of the incident; breach of contract or real property damage claims must be filed within one year. (Gov. Code, § 911.2.) Any amendments to a claim must also be submitted within the same statutory period. (Gov. Code, § 910.6.) Some claims, however, are excepted from the government claims requirement; these include employment claims under the FEHA, as well as section 1983 excessive-force claims.

Time limits to file a claim

The time frames noted above do not allow much time to investigate client claims and gather documents and other evidence to support them, and claimants might not even know the full extent of their injuries or damages until after the six-month window has passed. Nevertheless, the deadline must be met and the claim must include as much information as is known at the time of filing.

Failure to meet these legal deadlines will generally bar the lawsuit, although relief for late filing can be requested. Public entities have 45 days to act on a claim unless otherwise agreed between the parties. (Gov. Code, §

912.4.) If the claim is rejected, claimants generally have six months from the date of the rejection letter to file a lawsuit.

Preparations before mediation with a public entity

Parties and their counsel should recognize the settlement value and potential verdict value of a case early in the mediation. Because public entities must obtain settlement authority before they can negotiate, there is no benefit in withholding information.

A well-prepared plaintiff's counsel will have explained their position on liability and damages to public-entity counsel long before mediation. And while there may be significant disagreement on these issues, the more information the public entity has before mediation, the more likely it has been given the basis needed to participate in mediation with appropriate levels of authority. If plaintiffs introduce new crucial information during the mediation, the entire process could come to a screeching halt.

Public-entity attorney preparation

Public defendants have far less flexibility to shift gears during mediation than private defendants, so important discovery must be completed before the scheduled mediation date. The process for obtaining settlement authority may be time-consuming, involving multiple levels of approval from multiple stakeholders.

Most mediation-approval processes 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 a delay of several months before mediation can be scheduled.

State settlement chain of command

When the state is involved, 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. It may require meetings or revisions before approval is obtained and 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 department or agency's legal counsel, its director, and – depending on the level of authority requested – the governor's office. To make matters even more challenging, if approval is required from the state legislature, the timing of a legislative session may become a factor. It could take several months after a request for authority has been submitted before a matter is ready for mediation.

Local-government chain of command

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 involve similar processes, with many levels participating in the approval and 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, 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.

Discovery before mediation

For all of these reasons, comprehensive discovery should be completed before a mediation. If important information is first introduced at mediation, the defendant may need the case to be re-evaluated, which could entail going back to step one of the authority-approval processes. For plaintiffs eager to settle their cases and move forward, this can be frustrating.

Plaintiffs and their counsel should understand that when mediating with public entities, time will be required for defendants to obtain settlement authority. Counsel should learn as much as possible about the processes applicable to a specific defendant and set client expectations accordingly.

Mediation-session negotiations

Settlement authority

Unless those representing the public-entity defendant have the proper authority to settle the claim for a specific amount, the mediator can do little to move the parties toward resolution. They may be able to share information and evaluate the strengths and weaknesses of claims, but there is no benefit to exploring monetary terms without proper settlement authority.

Most public entities are self-insured, so they will be negotiating with their own money, rather than insurance proceeds. This could cause them to undervalue claims or try to settle them for far less than their worth. Plaintiffs and their attorneys should consider this when deciding whether to settle or proceed with a lawsuit.

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 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.

The mediation session is not confidential

Because of transparency-in-government requirements under state law, there can be no confidentiality requirements in settlement agreements with public entities. The public may even have access to certain settlement documents through the Public Records Act. There can also be no "gift" of public funds in negotiated settlement agreements. What exactly does that mean? The public entity and its counsel must have a basis for offering an amount that may resolve the matter. It does no good to play "hide the ball" with information that can affect the ultimate value of a case.

Preapproved authority

Public-entity defendants generally cannot request additional monetary amounts during mediation, in excess of previously approved authority, just to get a matter settled. Additional hurdles exist in employment cases, where pensions, service credit time, reinstatement and other aspects of employment cannot typically be addressed during a mediation; there are other laws, or departments or sections of the public entity that must be involved, and these issues cannot be a part of the negotiations.

Unlike with private defendants, public entities will generally not be able to make a call to risk management, the home office of an insurance company, or a corporate representative asking for more authority during the mediation. Non-monetary consideration, 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 also cannot be part of a negotiated settlement.

Mediation settlement agreements

If the case settles at mediation, it is generally a good idea to create a memorandum of agreement to memorialize the terms of the agreement; often public-entity counsel will 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

Even when a case has settled at mediation, there may be significant delays in concluding the matter. Depending on the amount of settlement, many public entities can follow the typical payment time frames of private defendants – approximately 30 days after all paperwork is executed and submitted post-mediation, unless a board or council needs to approve for the next level of authority.

If the state is involved, it could be many months before the state controller's office issues payment and even longer if the governor's office or approval by the state legislature is required. With multiple levels of approval required and a wait for the next legislative session, considerable patience may be needed for recovering from the state.

The trade-off

Despite the delays and inconvenience, there has historically been no risk of nonpayment of an approved settlement with a public-entity defendant. Budget issues may affect timing of the payment, and plaintiffs and their attorneys may need to be flexible, but plaintiffs should take considerable comfort in knowing that payment is on the way.

A jury verdict, in contrast, can be reduced by the trial court or can be overturned or remanded on appeal. The post-verdict process could take years to play out, effectively dragging out the resolution and not allowing plaintiffs the closure so often needed to move on with their lives. Furthermore, even unchallenged judgments 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. Though seldom used, this tool is nonetheless available to public entities.

Conclusion

Mediations involving public entities involve unique hurdles and can take considerable time, but if parties understand these challenges in advance of mediation, they should be able to navigate the process with realistic expectations. With so much activity going on behind the scenes, it may seem as if the defense is dragging its heels before going to mediation, but this is just the reality of mediating with public entities.

A mediated settlement with a public entity, even cumbersome and lengthy, should be a sure thing. The process may be slow in terms of when the case is ripe for mediation, 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 and forthcoming in the exchange of information needed to evaluate the claim, mediation can offer both sides the best possible solution for claims against public entities.

Attorney Rhonda Mallory is a neutral with Signature Resolution *with a background in matters involving public entities. After working in the private sector for 15 years in insurance defense, she joined the California Department of Transportation (Caltrans), handling primarily employment, complex tort, and eminent domain matters. Most recently, she was a supervising deputy attorney general for the torts and condemnation section with the Department of Justice, where she managed a team of attorneys handling dangerous conditions of public property, civil rights claims, and eminent domain and inverse condemnation. Rhonda can be contacted at rmallory@signatureresolution.com.*