

Preparing for Mediation: Effective Representation of Clients

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Introduction

Despite the greatly expanded use of mediation, there remain opportunities for improvement on how attorneys can best prepare for a mediation and equally important, how best to prepare their client for mediation. Often, the lack of appropriate preparation contributes to the failure of the mediation. The purpose of this article is to review how best to prepare for and participate effectively in the mediation process.

Once the parties have agreed to mediate, a lawyer and client should meet a reasonable time prior to the mediation to prepare. Just like preparation is critical in negotiation or litigation, it is also critical in mediation. This article covers the topics that should be discussed with a client prior to the mediation.

Bring an Informed Client

Do not assume your client fully understands the mediation process. Take care to explain the difference between mediation and litigation (and arbitration), pointing out that the mediator is not empowered to decide the dispute and will not likely even render an opinion about who is right and who is wrong. Explain the mediator's role carefully, mentioning that the mediator may function as a devil's advocate and will no doubt provide feedback about the strengths and weaknesses of the parties' positions. Clients sometime incorrectly assume the mediator is taking sides when he engages in this discussion; explain this type of candid dialogue is occurring with both sides to the dispute.

Because mediation contemplates a full, complete and candid discussion about the dispute, tell your client about the rule of confidentiality and explain that what is said in the mediation cannot be used against the parties later in the proceeding, nor can the mediator be subpoenaed to testify. During the caucus stage of mediation, it is my practice to explain that if either party wishes to keep information confidential, I will, of course, do

that. Otherwise I will assume that what is said in the private caucus may be shared with the other side if appropriate to do so.

Because the lawyer's role in mediation is quite different than in litigation, the differences should be explained. The presentation of information about the case will be quite truncated and so the client should not expect the pomp and circumstance associated with full blown litigation. Moreover, remind your client that your role will be much less "confrontational" than it would be in litigation and explain why that must necessarily be the case in mediation. Indeed, constructive, respectful conversation is key to a successful mediation. We know from experience that negative communication rarely leads to resolution. This does not, of course, mean that the lawyer will not forcefully advocate for the client, especially in the confines of the caucuses that ensue during the day. It simply means that a productive mediation does not include posturing and acrimonious communications between counsel and/or the parties. Save that for the courtroom. Come strategically armed to provide the mediator the information necessary to advocate your position in the mediator's private sessions with the other party.

Client Participation: Client Preparation Can Make a Difference

One of the guiding principles in mediation is that it is a process that empowers the parties to resolve the dispute on terms they find mutually satisfactory. A client's active role in mediation is dramatically different than the more traditional role of a party in litigation which is to stand quietly by while the attorney does all the talking. Because mediation is intended to be a process in which the parties play a major role, lawyers should prepare their clients to be active participants in the process, to the extent they are capable and willing. Of course, this does not mean that the clients will be expected to discuss legal theories. But the parties should be prepared to discuss the facts at issue, and of course, the terms of settlement. As the mediator I look forward to the opportunity to speak directly with clients during the mediation process, believing the client involvement is important to the success of the process.

Whom to Bring to the Mediation: Careful, Strategic Decisions Matter

A party representative with appropriate settlement authority should be in attendance at the mediation. Is the defendant expected, however, to have someone at the mediation with authority to settle in the amount of plaintiff's demand, regardless of how high? Of course not. The parties should come into the mediation represented by individuals with appropriate settlement authority.

It is important, however, that parties arrange in advance to be able to communicate with superiors where additional settlement authority may be needed. Nothing is more frustrating when at the end of the mediation, and only a few more dollars are needed, the company officer needed to sign off on the final settlement is in another part of the country, has gone home, or is otherwise not reachable. Obtain office, cell home numbers, and emails, of everyone who will need to be consulted during the process and if a final settlement is reached.

There is another aspect of this issue that is often overlooked. All disputes involve relationships between people. Sometimes the parties involved have so much emotional involvement in defending the decision they made which gave rise to the dispute, that settlement is quite challenging. When a business is a party to a dispute, it usually is possible to include an additional representative, not directly involved in the dispute, to help bring a more objective examination of the situation.

Because having the right participants at the mediation is critically important, and because it is not normally possible for the mediator to know whom these individuals are, I encourage counsel to discuss this topic well in advance of the mediation to ensure that the right people are present.

Mediation Memoranda: Exchange Memos. but Share Other Information Confidentially

It is customary, indeed essential, for the mediator to have background information about the dispute. This can be in the form of a mediation memorandum, letters exchanged between the parties, or key pleadings. Whatever is provided to the mediator, keep in mind that it should enable the mediator to have a good grasp on the issues to be discussed at the mediation. Be realistic about the quantity of information. Often materials are provided only days before the mediation (a practice to be avoided). Reams of materials with notebooks full of bills, tables, or schedules are rarely helpful. If a mediation memorandum is prepared, counsel will need to know whether it should be exchanged with the other side or whether it should be submitted to the mediator confidentially, and not shared with the other side. Although the common practice is to submit these documents to the mediator or settlement judge confidentially, I recommend that the parties exchange them. This topic should be discussed between counsel. The more each side knows how the other side views the dispute, the more likely the dispute will settle.

If there is any information that is truly confidential, the parties can provide that to the mediator in a separate document, or they can tell the mediator during the first opportunity at the mediation. The opportunity to provide this information is often

overlooked. It is extremely helpful to share with the mediator counsel's insights into the impediments to settlement and any settlement activity that has preceded the mediation. When the mediator has that information it can greatly enhance his effectiveness.

In addition to preparing for the mediation by carefully reviewing the materials submitted by counsel, it is my practice to speak privately with each attorney prior to the mediation. This conversation assists me in several ways. First, it allows me to confirm my understanding of the key issues in dispute. Second, it allows me to verify that the right client representative(s) will be in attendance. Finally, and perhaps most importantly, it allows me to gain insight into confidential issues that will help me better facilitate a settlement.

Related Litigation: An Often Overlooked Topic

Occasionally, there are related claims and parties to a dispute. A related case may be pending in court, or there are claims in the dispute involving other parties who are not intending to be part of the mediation. This is important information for the mediator, particularly because the parties themselves can sometimes inadvertently overlook the advantages of bringing all outstanding claims and related parties into the mediation for a complete resolution of the dispute. Knowledge about other related claims is critical for the mediator. The parties normally want closure globally to the dispute. The motivation of the parties to settle will be enhanced if settlement means resolution of all claims not just a piece-meal solution. Moreover, if there are other disputes, the parties to those disputes have additional resources which can be contributed toward the resolution. Putting it bluntly, new parties can mean additional sources of money which may expand the settlement pie. I need not tell you that failing to identify such future exposure can be problematic if the client pays for what he or she believes has achieved the end, executes a settlement agreement and release, but then has another potential party reopen new claims

The Opening Statement: Soft on the Person, Hard on the Problem

Most settlement conferences before judges, and some mediators, begin with an opening statement made by the attorneys. Attorneys often inquire about the necessity of making this statement and how to present it. Counsel should know prior to the mediation whether such a statement will be expected. There are several schools of thought about this.

Some mediators favor an opening statement. Their rationale is that the parties should be able to hear first hand from opposing counsel about the case and the other side's position

in the dispute. According to the proponents of this approach, the opening statement is an aspect of "reality therapy" which is important to the success of the mediation. The assumption is that each party's lawyer has not presented very forcefully the opposing side's view to his client and that the parties themselves should hear directly the other side's perspective on the dispute. Remember, however, everything that is communicated in the opening statement can be communicated by the mediator during a later private caucus.

If there is to be an opening statement, counsel should be firm, but polite. Remember the mediation adage--be soft on the person, hard on the problem. Although it is theoretically possible that counsel can make an opening statement that adequately conveys a position in the case without offending the other party, based on my experience in many mediations, this is the exception rather than the rule.

It is because the opening statement by attorneys carries great risks, I now dispense with it in most cases. I believe that an advocacy presentation at the outset of the mediation will normally only cause the parties to become further entrenched in their positions. These statements necessarily tend to "throw stones" at the other side, and when mud is being slinged, a person's reaction is to sling back. The process of settlement is not furthered when the parties dig their heels in even more before the real work at settlement even starts. If, however, you believe an opening statement would be advantageous, please take that up with me during our premediation call. For the same reason, if the tone of your mediation memo is to attack, then we need to discuss if it is best not to exchange them. If, on the other hand, the tone of the mediation memo is firm and offers information designed to get the other party to truly think about the issues more carefully, then by all means exchange them, as the memo may be one of the first times the other party actually reads a synopsis of your position, as opposed to having it filtered through counsel. Know your audience.

The proponents of the opening statement are correct in believing there is essential value in the reality therapy of the mediation. It is not necessarily the case, however, that the reality must be brought home by opposing counsel. The mediator has the primary responsibility to make sure the parties are fully informed about the consequences which will occur if the dispute is not resolved, and so it is not necessary, in my opinion, that opposing counsel deliver that message during the opening session. In fact, that is often counterproductive.

I recognize that there may be exceptions to this rule, particularly where the parties themselves speak in a joint session. This, of course, must be handled with care. If a lawyer intends to allow his client to speak in the presence of the other side, careful thought must go into that presentation.

Identify interests of each party

Mediation allows the parties to resolve disputes in ways that meet their needs and interests. The effectiveness of the mediation can be enhanced if the parties and their attorneys consider their interests and the interests of the other side in anticipation of the mediation. Lawyers and clients will frequently be the best source of creative ideas to resolve a dispute. Do not wait until the day of the mediation to rely solely on the mediator to tap that creativity. Well before the mediation, begin focusing your attention on the topic of "interests." As you prepare for the mediation ask your client to articulate clearly her or his own interests and needs, and equally important, consider how the opposition would define its interests and needs. This topic should be discussed during our pre-mediation phone call.

Know the Case

Certainly, the preparation for mediation is quite different than for trial. There are no witnesses to prepare. There are no exhibits to be marked. There is no opening statement and closing argument to rehearse. But just like in trial preparation, in preparation for mediation, good attorneys will master the facts and the law pertaining to the dispute. The result of the mediation is closely related to the party's position and its ability to present that position in a persuasive manner. The resolution of a dispute through mediation will be somewhere along a continuum between the parties' respective positions. Whether resolution is achieved along that line is directly a function of the respective strengths and weaknesses of the parties' positions and the level of preparation and advocacy presented by the parties and their counsel.

The party who is better prepared with an understanding of the facts and the law, and better able to articulate why his or her view of the dispute is the correct one, is undoubtedly more likely to achieve a result favorable to his or her position. As part of this preparation identify information that is needed before settlement can occur that is not in your possession. If a party believes it needs certain information upon which to make informed decisions about settlement, it must seek that information before the mediation. Once counsel has determined whether any additional information is needed, counsel should then focus on the strengths and weaknesses of their own case, and their opponent's. During the mediation, each party must arm the mediator with arguments and analysis about their respective positions. The mediator's ability to facilitate a resolution is greatly enhanced if the parties and their counsel provide the mediator with the information that will most directly impact the resolution of the case.

Discuss Possible Outcomes

During the mediation it is common for the mediator to explore with the parties possible outcomes of the dispute. Surprisingly, many lawyers do not discuss the range of outcomes in litigation as fully with their clients as might be expected. Get a head start on this critical topic before the mediation. I suggest you prepare a thoughtful analysis of best case options, worst case options, and most likely options, including the costs (attorney's fees and other costs) associated with each. Remember in many cases the losing party may become responsible for the prevailing party's attorneys' fees. That should be taken into consideration as well.

Cases settle because the parties choose the certainty of the agreement reached during mediation over the uncertainty of the resolution if left to a trial, as well as the transactional costs (e.g., time, money, emotion, business disruption, etc.) of continuing on with the dispute. Generally speaking, the result in litigation is uncertain. The discussion of possible outcomes of the dispute between the lawyer and client will be important to the success of the mediation.

Estimate costs of continuing litigation through trial

This is another critical component of the mediation which can be aided by pre-mediation preparation. Very often, a prevailing party in litigation will be able to recover all or a portion of its fees from the opposing party. Thus, by resolving the dispute through mediation, a party will avoid its own costs and legal fees, and, depending upon the outcome of the case, avoid the possibility of paying their opponent's fees. Fully understanding the economic cost of continuing on with the dispute always facilitates settlement. In addition to the economic costs of litigation, consider the noneconomic costs as well. The cost of litigation includes time off from more productive endeavors and, of course, the emotion stress, anxiety and disruption of the business and lives of those involved, that is inherent in the litigation process.

Develop settlement options

This is the last piece of the mediation mosaic. Although parties often look to the mediator for creative solutions to problems, in truth, the parties themselves are generally in the best position to develop the creative solutions to the dispute. Start before the mediation by discussing this topic with your client as part of the pre-mediation

preparation discussions.

Ask your client to identify and list all of the things the other party can do to satisfy your client's interests. Ask your client to identify and list as many possibilities of what he can do to satisfy the perceived interests of the other party. In particular, ask him to list all necessary non-economic components of a settlement. Surprisingly, many lawyers think of these issues for the first time as the final settlement terms are being discussed during the mediation.

Settlement Terms

In every settlement there are critical elements that must be included from each party's perspective. These issues should be discussed before the mediation. These are often noneconomic issues which are generally easily to resolve, particularly where they are articulated early in the process. Examples include confidentiality, appropriate releases, obtaining settlement approval by public agencies. Make a list of these topics beforehand so last minute introduction of critical terms can be avoided.

The important discussion to have before the mediation, however, concerns your client's position on the ultimate issues in dispute. Assuming the issue is money and how much gets paid by one side to the other, the parties should make some judgment about where they need to be when the process ends. It is critical for your client to understand, however, that if the mediation is successful it is very often the case that the party receiving a payment will get less than he or she anticipated, and the party making the payment will pay more than he or she anticipated.

The reason for this is that the parties' settlement positions will change as a result of the mediation process. When the parties assess their positions before the mediation, that is done without the benefit of the give and take discussion that occurs during the mediation. It occurs without the important feedback received from the mediator.

Thus, it is unwise to decide in advance with your client on a "bottom line" beyond which you will not move. It is better to think in terms of settlement ranges, reminding your client to approach the process with flexibility. Alert your client to the give and take that will occur during the mediation, and that if settlement is to be achieved, their most optimistic expectations may not necessarily be realized. Quite simply, be realistic and reasonable.