Dos and Don'ts

for Attorneys Representing Clients in Mediation

How do you know if mediation is appropriate for your client? How do you prepare yourself and your client for mediation? A mediator and former litigator offers 11 practical tips for attorneys who represent clients in mediation or are contemplating doing so.

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There is no magic formula for a successful mediation. But there are basic factors that are key to effective mediation, such as the willingness to work with the other party in resolving a dispute and being open to what the other party and the mediator will bring to the table during theprocess. It is certainly to your advantage to familiarize your clients with the process. For attorneys who are new to mediation, there are countless "how to" books, articles, seminars and workshops that offer advocacy strategies. It also helps to get the insights of practitioners and mediators. This article is exactly that: practical tips based on my experience as a mediator.

1 THE TIMING OF MEDIATION IS CRITICAL. DON'T RUSH INTO MEDIATION WHEN THE PARTIES ARE TOO FAR APART, OR WITHOUT KNOWING THE STRENGTHS AND WEAKNESSES OF YOUR CLIENT'S CASE, OR WITHOUT HAVING CONDUCTED AN INVESTIGATION. ON THE OTHER HAND, DON'T WAIT TOO LONG EITHER.

Some people believe that when the parties are too far apart, having a mediation, even if it fails, is better than not having a mediation. The thinking goes that even a failed mediation brings the parties closer together. In reality, the opposite can be true. A party who is unprepared may give the wrong impression and lead the opponent to believe the case is not a strong one and actually lower the value of the case. This can cause problems in future negotiations when the parties are tied to an early assessment of the case.

Also, sometimes parties rush into mediation without an adequate investigation. Some even decide to mediate for the sole purpose of fact gathering and obtaining free discovery. But this is an abuse of the process. Mediation is not the place to learn new information about the case for

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the first time. Most mediators will stop the mediation if this occurs.

The best time to mediate is after you have conducted an investigation and know the strengths and weaknesses of each side's case and who is willing or unwilling to go to trial. Often this is after the parties have exchanged documents. In a complex case that is in litigation, it is after the parties have deposed one or two key witnesses. I believe that this can greatly enhance the likelihood of a successful mediation.

On the other hand, waiting too long to mediate can also be a problem. For example, it could mean that the parties have already driven up litigation costs and/or that they are too entrenched in their positions, making it difficult for them to settle. Mediating a case at the right time can contribute to a successful mediation.

A dispute with a firm and soon-approaching trial date generally has the best chance of success at mediation. Conversely, a case with no trial date or after a motion for summary adjudication (or some other dispositive motion) has been filed can make mediation unsuccessful because the parties are unwilling to negotiate in the face of uncertainty. A pre-mediation conference with the mediator can help the parties determine if the case is ready for mediation.

2 BEFORE MEDIATION, CONFER WITH YOUR CLIENT. YOU NEED TO PREPARE YOUR CLIENT FOR THE MEDIATION.

Would you be surprised to learn that many lawyers do not meet with the client before the mediation, or if they do meet, it is only briefly?

A common misperception is that a case can settle at mediation with little or no preparation. That is simply not true. The lack of preparation for mediation is the cause for many mediation failures. Thorough preparation is essential to give your client the best chance for settlement.

A successful mediation starts with a substantive pre-mediation meeting with your client at your office. Among other things, your client needs to understand the mediation process, including the concept of mediator neutrality, mediator style, and confidentiality. It also means understanding what to expect in the joint session with the other side, and in private caucuses with the mediator. In addition, your client needs to be prepared to participate in the joint session. This means knowing what to say. Finally, the client should know your negotiation strategy, the strengths and weaknesses of each side's case, and the advantages of settlement versus going to trial. To determine this, you must prepare a realistic trial budget.

Many clients who are defendants or respondents don't know that they will probably have to pay money to settle the case. Both plaintiffs and defendants need to consider the tangible, non-monetary benefits of settling, such as finality, cost savings, time savings, and certainty. Plaintiffs should consider the ability to collect now versus waiting for the results of an appeal, which they could lose.

In addition to the preceding issues, the pre-mediation conference with the client should identify missing information your client needs from the other side or issues that need to be resolved before a decision can be made to settle.

Cases that settle at mediation are those where the parties have met and conferred with their attorneys and are ready to negotiate in good faith with full knowledge of the facts and issues from their point of view.

3 IF THE DISPUTE INVOLVES CONSTRUCTION, AN ACCIDENT, OR DAMAGED PROPERTY, VISIT THE SITE. THE VISIT CAN BE VERY REVEALING.

A site visit can be very enlightening and reveal to the parties and their counsel facts about the case that paper documents cannot convey. It is possible that a site visit will help determine who has the strongest case, and be a strong motivator for settlement.

4 DON'T RELY SOLELY ON SUBJECT-MATTER EXPERTISE. YOU SHOULD WANT SOMEONE WHO WILL BE EFFECTIVE IN BRINGING THE PARTIES TO A SETTLEMENT.

Generally, the attorneys for the parties choose the mediator. Attorneys often choose a mediator they know from another case or recommended by a colleague.

Subject matter expertise is important in certain cases, for example, those involving employment, construction, and insurance. But more important than knowing the subject matter at issue is choosing a mediator who can get the case settled.

The mediator you choose should have integrity, be tenacious, creative and persistent, see the positive in all situations, and have a reputation for settling difficult cases. Most importantly, the mediator should be a person you and your adversary will feel comfortable trusting in any situation. Trust is key because for a negotiation to move forward, the parties need to be able to discuss their positions and interests candidly with the mediator.

5 DON'T AUTOMATICALLY REJECT A MEDIATOR CHOSEN BY THE OTHER SIDE.

If your client seriously wants to resolve the dispute, it makes sense to accept a mediator proposed by the other

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side, even if that mediator is someone the other side knows from a prior mediation. Choosing a mediator with whom your opponent feels comfortable is a good strategy because your opponent may be more willing to say "yes" when this mediator conveys your settlement proposal. There is no risk to your client because he or she can always decline to accept an offer from the other side.

6 DO PREPARE MEDIATION BRIEFS.

Going to mediation without a brief is like taking a deposition without reviewing all the relevant documents exchanged through discovery. It can be done, but the results will depend heavily on the experience of the mediator.

Mediation briefs should briefly describe the type of case (e.g., construction, real estate, insurance), and the important facts and legal arguments. If there is a document or legal precedent that strongly supports a claim, defense or counter-claim, or affects the value of the claimed damages, attach a copy to the brief. The kind of information mediators usually look for include a description of the parties' historical relationship, what efforts have been made to settle before or after litigation was filed, prior settlement demands and offers, the reasons that the parties have not been able to settle the dispute themselves, potential non-monetary solutions to the dispute, how willing the parties are to compromise, and the willingness of the parties to stay and negotiate until the case is resolved.

I prefer confidential mediation briefs so that the parties can reveal if one party is motivated to settle or plans to take a hard line, and the reasons for mediating the case at this time. To be successful, the parties need to trust the mediator and provide information in the confidential mediation brief that will help the mediator settle the case.

7 DON'T SKIP THE JOINT SESSION.

A joint session is the opportunity to meet face-to-face with the other side. It usually occurs at the beginning of the first mediation meeting. A joint session is like taking the other side's client to lunch and asking them off the record what the case is all about. Many parties, on advice of counsel, decide to skip the opportunity to talk directly to the other party's decision maker in a joint session, even though this is the single most powerful moment in mediation. No one can speak so convincingly about the case as the actual parties. Often a well-prepared client statement at a joint session favorably affects the settlement value of the case.

When making this statement, the client should articulate the exact injury, theory of liability and damages, all without attacking the other party. A focused presentation will give the mediator information to work with in the private caucuses.

Rather than avoid the joint session, I recommend that parties prepare for the joint session as the main event of the mediation.

8 DO PREPARE A SOLID OPENING DEMAND THAT HAS A BASIS IN FACT.

Any mediation that does not begin with a clear demand and supporting evidence is like trying to drive a car without an ignition key. A solid opening demand sets the tone for a successful mediation.

A common mistake plaintiff's make is to come to mediation without having made a pre-mediation demand on the theory that it will give more room to negotiate. The opposite is true. Unless the defendant has a "ballpark" figure for the case prior to mediation, the plaintiff 's opening demand could come as a surprise. Surprises at mediation usually result in no settlement. The defendant needs time to understand the basis for the demand and whether it will be necessary to adjourn the mediation in order to obtain additional settlement authority. The best strategy is to make a pre-mediation demand that ensures both sides clearly understand the scope and basis for the plaintiff's damages prior to attending the mediation.

Some people believe that if the plaintiff does not make an outrageously high demand at the opening session, it will not extract the highest offer from the opposing side. This is not true. The best opening demand is one that is based on strong facts, thorough research, solid documentation and a well-respected expert witness.

A side benefit of making an opening demand based on the actual value of the case is that mediation tends to proceed to a settlement rapidly. However, an opening demand that is perceived to be "out of the ballpark" produces a predictably "low ball" response. Unless the plaintiff quickly adjusts the opening demand into a more reasonable zone, the mediation will slow down or result in an impasse.

The key is finding the "zone of settlement" for the case. This is done mostly by the parties themselves since they have the most experience with the case and are aware of typical jury verdicts affecting their business. If the parties don't move into this zone, then the mediator

must use his or her experience to bring the parties into a range where the case can be settled.

9 DO USE TECHNOLOGY TO MAKE AN EFFECTIVE PRESENTATION.

Mediation is about the power of persuasion. Anything that helps to persuade a jury will also persuade the mediator and the opposing party. Several years ago, it was uncommon to see an ELMO projector and laptop computer in the courtroom. Now, almost all trials involve some sort of technology and most federal courtrooms are fit with state-of-the-art technology.

Oftentimes, parties want to keep mediation costs down so they decide not to use technology. Others do not want to preview for opposing counsel the technology they intend to use at trial. If use of technology will increase the value of a case at trial, then it will also do so at mediation. Therefore, by not using technology at the mediation, the parties may end up with a lower settlement, or no settlement, requiring continued litigation that will increase dispute resolution costs.

Points can be emphasized by showing a portion of videotaped deposition testimony, or highlighting in a Power Point presentation part of a key document, or bringing to the mediation computer-animated simulations or other types of exhibits prepared by an expert witness for trial. A party who invests in technology for a mediation shows preparedness to go to trial and spend what is necessary to win the case.

10 DON'T JUST WALK AWAY.

Since approximately 85% of all mediations usually result in settlement, why would any party walk away from a mediation? Sometimes they walk away to show the other side they are serious and willing to go to trial. At other times they walk away due to inexperience or lack of preparedness for the mediation.

In most cases, walking away is the wrong move. It sends a negative message to the other side and creates an incentive to respond in kind. It may take several months and much more effort for the mediator to bring the parties back to the table.

The mediator looks for common ground to move the parties toward settlement. Walking away should be considered an appropriate maneuver only in rare cases, such as when one party refuses to negotiate in good faith, lacks adequate settlement authority, or is unwilling to discuss a reasonable zone of settlement. Even so, it should be done with the help of a mediator and an eye towards reconvening at a more opportune time when the parties can make progress towards settlement.

11 DO TAKE THE TIME TO DRAFT AN ENFORCEABLE MEDIATION AGREEMENT.

After spending a full day negotiating a settlement at mediation, some parties have been disappointed to learn that their mediated settlement is neither binding nor legally enforceable in court. Usually, the parties have worked long and hard to reach a deal, but now they want to go home, so instead of staying two to three hours to draft a solid mediation settlement memorandum that documents all the points of agreement, they quickly write up a few bullet points and sign their name at the bottom. This is not prudent.

The best way to ensure an enforceable mediation agreement is to bring a draft settlement agreement to the mediation on your laptop. Some attorneys will send a draft settlement agreement to opposing counsel before the mediation. If you are mediating a case in California, recent cases have ruled that the mediation settlement agreement must contain words to the effect that it is "binding and enforceable." When a dispute arises over the enforcement of a settlement reached at mediation, a California court may also look to see if standard terms found in settlement agreements, such as a statement that the agreement may be enforced under Code of Civil Procedure Section 664.6 and Civil Code Section 1542 waivers, if appropriate, are included in the writing produced after mediation. Thus, it is advisable to include these terms in a settlement agreement drafted at mediation to ensure enforceability by the court.

One advantage of having a mediation conducted at a courthouse as a mandatory settlement conference is the ability to have the settlement terms read on the record of the court, making them immediately enforceable. Even if the parties are not at the courthouse, it is still a good idea to call the trial judge's department and make an arrangement the following day to read the settlement on the record to avoid any confusion or delay in making the settlement enforceable.

Conclusion

There are as many paths to a successful mediation as there are types of disputes and parties. If you are representing a client in a mediation, or are looking forward to representing one, let this be a starting point for your own preparation. As you gain more experience in mediation, you will come up with modifications to the tips offered here or perhaps create your own. ■

Surprises at mediation usually result in no settlement.