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Practical Tips For Lawyers/Advocates Representing Clients In Mediation

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SPECIAL FEATURE

ALTERNATIVE DISPUTE RESOLUTION

The lawyer's role as an advocate in mediation is more subtle, but just as challenging as advocacy in litigation. With the increasing use of mediation, lawyers must sharpen their mediation skills and understand that effective techniques can influence the outcome of mediation, just as good trial skills affect a verdict.

Mediation is a facilitated negotiation. The mediator will encourage both lawyers and clients to participate in reviewing the facts, exploring the interests and objectives of all parties and developing options for a negotiated settlement. For many cases, a three- to four-hour session with a skilled mediator affords ample time to explore the issues and to reach agreement.

In the initial session, the mediator will usually cover ground rules of the mediation, verify that appropriate decision-makers are present, and ask each side for an initial presentation of the facts and the parties' present positions.

Typically, the mediator will meet with each party in a separate caucus after the initial joint session. The mediator may then choose to shuttle between the parties and reconvene a second joint session when an agreement appears to be reached. The lawyer has a critical role in each of these stages.

The following are 10 practical tips for representing clients in mediation:

1. *Prepare and plan.* Do not wait to put together your presentation until you arrive and meet the mediator. Your client's opportunity to achieve a satisfactory settlement on most favorable terms will be adversely affected by lack of preparation. Whether you are counsel to the plaintiff or defendant, mediation requires the same sort of careful planning as preparing for trial. Though the amount of time required will likely be less than trial preparation, the effort will also be rewarded handsomely in mediation.

At a pre-mediation meeting with your client, the first basic step is to explain the process and dynamics of mediation to the client. Mediation is not magic. To work, it takes clients who want to settle, or who are wary of not settling. Clients need to understand that it is not "winner take all." Instead, there will be some give and take on both sides.

In mediation, the client may hear the other side present its case for the first time and see the mediator listening to the opponent as if entirely credible. If your client becomes unnerved or convinced that the mediator favors the other side, your job will be much harder. Stress that active listening and neutrality are the hallmarks of a good mediator and that persuading the mediator is not the primary objective of the mediation.

Make sure that both you and your client have reserved sufficient time for the mediation session. Time pressure may force a mediation to terminate prematurely just when a settlement is within reach. Expecting the mediation to be over in an hour, for example, leads to needless impatience and unrealistic time constraints.

The second basic step is to assess your client's current interests and objectives. Review with your client the strengths and weaknesses of the case, as it then appears. Avoid the temptation to overstate either the strengths or the weaknesses. A candid assessment by you of the possible success and alternatives to a negotiated agreement is

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the only basis on which your client can make an informed judgment about settlement. Review prior settlement discussions and offers, if any. Develop a rational argument to support the reasonableness of your position.

In preparing your initial presentation for the mediation, assign roles to the client and yourself. Consider designating the client as the chief spokesperson and the first to speak. Opening remarks by the client are frequently perceived as a sign of strength and confidence. It is likely to prompt the other side to follow your lead. If the client is articulate and comfortable making his or her claim, it will signal your views on the probable success at trial without risking a perception that you are too confrontational. Pinpoint the client's sensitivities and decide how to handle them.

Locate the documents that most clearly support your position. Even though the Rules of Evidence do not apply, you may want to introduce a small number of documents that the mediator can reasonably assimilate. Decide in which order to show them, and how to mark them if appropriate. Be sure to identify privileged matter and other confidential items that will not be disclosed in the initial joint session but will be revealed only in private session with the mediator.

2. *Structure the mediation in advance.* Generally, the overall framework for the mediation should be set in advance through consultation with other parties and the mediator. Frequently, the mediator or mediation service will take the initiative in handling the logistics of location, schedule and attendance roster. If circumstances permit, opposing counsel may want to work out these details as a way of starting a collaborative effort. Unless otherwise fixed by a contracted-for mediation clause, limits on the time period for mediation may be considered. Ironing out these facets of the mediation in advance prevents distraction by procedural matters and allows greater concentration on the merits once the parties are assembled.

Do not attempt to establish a hard and fast "bottom line" with the client before the mediation. Allow your client the flexibility to experience a change of heart after hearing the other side and the mediator.

If you are mediating before a civil action is filed, or if you are not using an administered mediation program, you may be faced with the task of selecting a mediator. When selecting a mediator, ask for the mediator's training, credentials and experience. Though subject matter expertise deserves due weight, remember that the role of the mediator is to mediate. Training and experience in that capacity is most relevant and should be valued accordingly. In complex matters, it may be desirable to interview potential mediators, but, in the interest of maintaining neutrality, those interviews should be conducted jointly by both sides of the dispute. Resist the temptation to reject a mediator merely because he or she was proposed by the other side. Someone who is trusted by your opponent may be just the person to assist both sides in reaching a deal.

3. *Devise a strategy.* A mediated case demands a strategy, just as a fully litigated action does. Map out a strategy that leads to the settlement you want to achieve. Of course, that means figuring out your goals and the spectrum of settlement possibilities. If they are monetary, what is a reasonable range? (Practice tip: do not attempt to establish a hard and fast "bottom line" with the client before the mediation. Allow your client the flexibility to experience a change of heart after hearing the other side and the mediator.) What are the resources realistically available to fund a settlement? If the best solution is not financial, or is not limited to payment of money, think about other types of offers you would willingly entertain or make. In mediation, the parties control the outcome. As a result, the solution can be as creative or unusual as you want.

The initial presentation is key to influencing the mediator and the other side. For approximately 10 to 15 minutes, you and your client will have the floor to tell your version of events and state your position. Remember that for some clients, part of the solution to the dispute may involve the feeling that someone is listening to them and hearing their grievance. Mediation can offer them their "day in court."

You are missing an opportunity if you think you can "wing it" just because you are not in open court. Decide in advance what facts are most persuasive and how you will highlight them. Decide what your initial demand or offer will be, and whether it will be made in the opening joint session. Think about concessions, and when and how they will be made. For example, will you volunteer a concession in the initial session or will you wait until your first breakout session with the mediator? An early concession will signal a willingness to be flexible. Waiting will permit the mediator to present the concession to the other side and may help persuade the other side that the mediator's efforts should be "rewarded" by responsive concessions.

An experienced mediator will pick up the substance of your dispute quickly, even if he or she lacks in-depth knowledge of the particular subject matter. You can assist the mediator invaluably by summarizing the critical information in graphical "bullet point" charts or bar graphs. A mediator who understands the business dynamics of the dispute may be more creative in helping to fashion innovative solutions.

4. *Give your presentation a theme.* Just as in trial preparation, find the theme that makes your case compelling. For example, you and your client could emphasize the previous success of the business relationship and its future potential, uncontrollable shifts in the economy or advances in technology.

Here, the most successful themes strike mellow notes. Especially in the opening joint session with the mediator and the other side, aggressive posturing serves little purpose. Save the inflammatory metaphors and acerbic wit for your next discovery battle.

At least once in your opening presentation, toss a bouquet to the other side. Mention your opponent's good employment record, what a fine product the company manufactures, or the handsome building they designed. Explain to your client ahead of time that you have a reason for doing so. Just one conciliatory comment will go a long way in setting a constructive tone for the mediation and laying the foundation for agreement. It may be as simple as an expression of sympathy: "We know the injury was very painful." When you acknowledge the other side as having at least one human quality, you may well open the door to a solution.

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A calm, reasoned approach also builds credibility with the mediator quickly. Remember, the mediator is there for one purpose: to find a resolution to the dispute if at all possible. A lawyer who makes that process more difficult is only thwarting the mediator. The mediator is not looking for mush or milktoast, just a cogent statement of the facts and clear-headed assessment of the case. If you leave trial tactics for trial, and show a desire to make the most of the settlement dialogue, the mediator is naturally encouraged to work harder with the other side on your behalf.

5. *Focus on the interests.* An effective mediation presentation develops the facts and the legal issues that underlie the position of each party. Unless the case has been referred to mediation very early in the dispute, it is likely that the legal claim and assertions are well-known to both sides. Since it is most unlikely that the other side will respond to a purely legal argument, spend your time where it will be most productive. Focus on the interests and objectives of both sides. Too frequently the cynics say: "That's simple. I want more money. He wants to pay less." It is the rare case that is only about money. Be alert to explore non-monetary interests and alternatives to cash payments.

6. *Listen actively.* If you pay close attention, you will learn a great deal from the opening presentations in the joint session. Active listening is not only aural but intellectual. It takes an open mind. Depending on the amount of discovery taken, you may learn new significant facts. You may realize that the other side is pressing a different legal theory or you may see settlement options that you did not dream possible. You do a disservice to your client if you fail to catch important clues dropped by the players.

Actively listen to the mediator as well. Mediators are trained to use language carefully, and you should be listening for subtle messages.

Listening is essential for clients, too. Instruct your client ahead of time to listen and to take notes. Tell the client to listen to the mediator in particular, through whom the client may see things in a different light.

7. *Maximize your breakout sessions with the mediator.* Almost always, the mediator will meet with each party in a separate caucus. You should plan ahead for items to be covered in this breakout session. Are there additional facts the mediator should know in confidence? These can include undisclosed strengths (or weaknesses) in your legal case, time constraints, alternative proposals and negotiating framework. Though you need not "convince" a mediator, it is useful for the mediator to have a good understanding of your position on the most important points and on settlement parameters.

When the mediator walks in, have an informed idea about where you want things to go. This is not a settlement conference with a judge who is "in charge" and has authority to decide the case. Rather, the mediator expects counsel and the parties to lead the process. Give the mediator a rundown of the obstacles to settlement from your vantage point. Discuss any information that you have elected to keep confidential and now wish to share with the mediator. Let the mediator know where you may be flexible.

At the close of the first breakout session, verify that the mediator understands the assignments you have given him or her. The mediator is your emissary to the other side. Make certain that you have adequately communicated your client's wishes and know how they will be represented. You may wish, for example, that no monetary offer be conveyed, pending the other side's reaction to a new non-monetary proposal. The mediator will generally ask what information and proposals he or she is authorized to convey.

8. *Use the mediator as neutral and ally.* Everyone knows that the source of the mediator's authority is neutrality. As an impartial observer, the mediator is credible in a way that an advocate is not.

At the same time, a mediator can be your friend. For instance, a mediator can help in coping with an unreasonable client who refuses to accept a substantial settlement offer. A couple of well-timed glances in your client's direction will let the mediator know that the client, not you, is the roadblock. With that knowledge, the mediator can address the client directly to underscore the client's "WATNA" — or worst alternative to a negotiated agreement.

You may wish to solicit the mediator's reaction to particular facts, arguments or claims. When done in confidence, this can give you and your client new insights to possible paths to settlement.

9. *Stay with your client.* Stay with your client physically throughout the mediation. While the other side is in private sessions with the mediator, it is easy to lose concentration and momentum. The two of you need to be ready to act and react to proposals as a team. Use the "down-time" productively to discuss new developments, generate options or revise your strategy.

It is impossible to predict how long any mediation will last. Even veteran mediators regularly miscalculate the length of the time that will be required. Bring other work for the same client along, so that you can cover additional matters. Carry candy or snacks with you. If you must leave briefly, get a message to the mediator about your whereabouts and the time of your return.

10. *Be part of the solution, not part of the problem.* The challenge for lawyers, who are trained to control the process and their clients, is to let the mediator work. We lawyers are sometimes perceived as part of the problem, rather than part of the solution. Sometimes there is a financial disincentive for the lawyer to conclude the case. At other times, it is claimed, lawyers may fear "losing face" by settling too readily or appearing too reasonable. Mediation compels no solution where one side or the other would rather continue the fight. On occasion, that may be the optimum route. Before you resort to that recommendation, however, make sure that you and your client have used the mediation process fully to explore all of the alternatives to continued litigation. A mediation "win-win" may still be available.

At the end of the mediation session, if there is an agreement, document the deal on the spot. Too often a tentative deal unravels when the parties wait until later to reduce the understanding to a writing. Misunderstandings at that point may lead to charges of bad faith and, at a minimum, cost both sides additional time and money. The mediator can help smooth over language problems and ensure that the deal as documented fairly reflects the understandings that were reached.

Conclusion

Developing sound mediation skills will aid lawyers in offering clients additional options for resolving disputes. Following these simple tips will help to refine your mediation skills and perhaps to enhance the outcomes of mediation for your clients.

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