

Mediation Strategies

Preparation for Mediation puts Money In Clients' Pockets

By Lee Jay Berman

While all good attorneys prepare intensely for arbitration or trial, few put as much time into preparing for mediations. As the legal community continues to use mediation as an effective case settlement tool, it is becoming clear that attorney preparation plays a vital role in achieving a favorable result.

Various studies show that 95-97 percent of all cases settle before trial. In this legal climate, logic would dictate that attorneys should be investing significant time and resources getting ready for mediations. While money spent on a successful mediation can be relatively minuscule compared to the costs of trial, an unsuccessful or frustrating mediation can be a costly investment.

Here are a few ways that advance research and homework can maximize your chances for settlement in mediation:

■ **Learn about the mediator.** Information is power. Study the mediator's web site. Knowing the mediator's background will help lawyers decide whether to explain the case's substantive subject matter in lay terms or in industry-specific terms of art.

Find out if the mediator prefers a brief, an informal letter, a copy of the pleadings or no advance information at all.

Ask colleagues about the mediator's style. Find out if this mediator tends to ask the clients to give an opening statement or prefers to hear from counsel. Ask if this mediator can be trusted with an honest bottom line and confidential information.

Find out if your mediator is an expert negotiation strategist, or if the participants will need to lead the dance. Learn if this mediator will simply pound on both sides in caucus, or whether he expects to evaluate the case's merits and pitfalls. This information can help to make counsel more effective with a mediator.

With larger or more sensitive cases, mediators often welcome phone calls from counsel explaining a case's particular challenges or subtleties in advance of the mediation. Sometimes counsel fail to do this because they worry about appropriateness of such *ex parte* communication, but in mediation, such communication is not only allowed, it is an integral part of helping the mediator with key insights.

■ **Know the details of the case.** Clients know their cases intimately. They also can sense when counsel are bluffing and aren't familiar with relevant dates, names, and amounts.

Clients also know that when attorneys talk about them in the third person and awkwardly refer to them as "my client," they cannot remember their names.

Ultimately, counsel must understand the details of the case as if it were their own dispute. Counsel should write, or at least review, the briefs if only to reinforce the case details in their own minds.

It is often advisable for attorneys to prepare a chronological event timeline as a guide during their opening statement.

Knowing the case and presenting it well makes the attorney appear sincere, honest and knowledgeable, which will impress the mediator and opposing counsel. Such advance planning usually results in more money in the client's pocket at the end of the day, which will help keep clients loyal and generate referrals.

■ **Prepare the case.** Timing is everything. Scheduling a mediation can sometimes present a challenge. Good mediators are often booked weeks or months in advance, and trying to predict when sufficient discovery will be completed, which will help make the mediation more productive, is often a difficult calculation. While discovery information can always be exchanged during the mediation, it often leaves the recipient insufficient time to evaluate it and respond appropriately.

Do not mediate a case that is not ripe for settlement. Considering the mediator's fees, client and counsel preparation time, brief writing and the costs to the client, it is sometimes wiser to pay a cancellation fee and postpone a premature mediation.

Also, few things hurt the attorney-client relationship more than a long, frustrating day spent in an unproductive mediation which was expected to be successful. Communicating with the mediator and opposing counsel can help to ensure that all are ready, have what they need and are coming prepared to make tough decisions about how they are willing to resolve the matter.

On the other hand, attorneys with agile clients who are prepared to make immediate decisions can have a productive mediation by sharing and considering information introduced during the mediation to make solid settlement decisions. In business and transactional disputes which don't involve adjusters, mediations can still bring closure even when discovery responses are still outstanding.

■ **Educate the client.** Clients are increasingly being asked to participate actively in mediations. Seasoned counsel understand that in addition to presenting their case at a mediation, they are also presenting their client. Preparing the client in advance with an understanding of what to expect and what will be expected of them will help them be more articulate and persuasive. Clients who present their cases well overall have an edge in settlement negotiations.

Counsel should review with the client what to cover or emphasize during opening statement. Clients will be evaluated as potential witnesses, especially if they have not yet been deposed. Attorneys who represent clients in mediation regularly can sometimes underestimate the discomfort legal and quasi-legal proceedings can cause their clients.

Don't make the mistake of misleading the client by asking her to develop a bottom line in advance of the mediation. Instead, prepare her properly to evaluate new information and make a decisions based upon what happens in the mediation.

Clients also need to be prepared for the difficult nature of the mediation process. It is often hard on clients who begin the day with high expectations, and thus become disappointed by the other side's subsequent offers. Such a mediation often leads to successive steps backwards and compromise after compromise, en route to a final compromise that can be disappointing in comparison to initial high expectations.

Clients, however, who are prepared for the negotiation dance will be much more pleased with the end result. After all, the mediation may be their only "day in court".

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