MEDIATION CENTRAL

Getting the Most from Mediation

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We have all seen the statistics suggesting that 95% or more of all civil cases never go to trial. Instead, a significant portion of these cases resolve at mediation. Knowing this, attorneys, clients, and the mediator should all strive to maximize the probability of success at mediation. Here are a few suggestions, gleaned from my experience both as an attorney advocate in mediation, and now as a full-time mediator of civil disputes.

1. **Talk with your client early about the probability of mediation.** In the early stages of litigation, your client likely wants to hear how hard you will fight for them, including all the way through the end of trial. They should hear that. But they should also hear early on that -- although you will prepare the case and be ready to try it -- at some point, you will likely suggest mediation as the best way to resolve the dispute. Why have this discussion early? Two reasons: first, in all likelihood, you will suggest mediation (either because the other side wants it, the court "suggests" it, or you feel it is appropriate). Second, if your client understands early on that mediation is likely, then your recommendation of it months (or years) into the litigation will be received by the client as an anticipated part of the litigation process, rather than a sign of your lack of faith in the merits of the case.

2. **Prepare your client in advance of the mediation.** A thorough discussion with your client about what to expect procedurally during mediation is invaluable. Not only will your client be more comfortable with the process, but once the client sees that the mediation is progressing as you said it would, your credibility -- and that of the mediator -- will be reinforced. And as we all know, trust and credibility are key to a successful mediation.

3. **Submit your mediation brief well in advance.** This is especially true if you represent the party seeking monetary compensation from the other side. In practice, most mediators request briefs a few days prior to the mediation. While that may be fine for the education of the mediator, in most instances, that is far too late to educate the insurance adjustor (or other person holding the purse strings). Many insurance companies meet to discuss potential exposure on cases two weeks (or more) prior to the mediation. You might have the most convincing brief in the world.... but if it arrives to defense counsel after the decision regarding the amount of money to offer in settlement has already been made, you do your client a disservice.

4. **Be open about the exchange of information**. If you are hesitant to exchange your entire brief with the opposing party, make portions of it

confidential, but share the rest. Educate the mediator as to your views on impediments to settlement. If you represent the plaintiff in an injury case, provide with your brief pictures or a video demonstrating the impact of the injury. Provide two copies of the brief and pictures/video to the defense (one for counsel and one to send to the carrier). Attach key documents (not the entire medical chart or a lengthy contract if all portions are not relevant). Incorporate key deposition testimony into the body of the brief. Provide data on the value of similar cases (for example, by attaching excerpts of jury verdict publications). Call opposing counsel a few days after you send the brief to find out if there is any additional information they need to evaluate the case.

5. **Use the mediator to your client's advantage**. Presumably, everyone at the mediation is there to make a deal happen. The mediator cannot read your mind. If it is best for the parties to never cross paths during mediation, tell the mediator. If your client needs some "hand holding", tell the mediator. If your client needs to vent and feel this is their "day in court", let the mediator know. If you need the mediator to deliver bad news so you can save face with your client, that's fine! If your client needs a large dose of reality, the mediator is happy to deliver. If you need information from the other side, have the mediator ask your opponent if the data can be shared. Work the mediator for all he/she is worth!

6. **Have your financial house in order.** Come to the mediation with some key financial data so the mediator (or you) can realistically discuss with your client what the future holds if the case does not resolve at mediation. For example: the amount of fees/costs your client has paid to date; an estimate of the fees/costs anticipated in the future; an estimate of the length of trial and the "cost" to your client in money, absence from work/home, etc. If you represent the plaintiff in a contingency case, bring a printout of the costs incurred to date. Have a copy of the fee agreement with you so you can calculate an approximate "net" recovery for your client to evaluate. If there are liens, negotiate reductions in advance of the mediation so your client understands his/her obligations when evaluating a settlement offer.

7. **Don't rush the process.** Most mediators spend the first portion of the mediation either individually (or in a group session) discussing his/her background, explaining the process of the mediation, summarizing his/her understanding of the issues, listing the potential goals of the participants, etc. While you as the attorney may have sat through this (or similar) presentations many times, do not cut this process short. The mediator is establishing trust and rapport with your client. A small investment of time at the beginning of the mediation is sure to reap rewards as the day drags on and emotions rise. Once the mediation is in full swing, let the "dance" unfold. This is a vital part of

the negotiation process that cannot be short-circuited. After agreement is reached, do not have one foot out the door to catch a plane or hit the highway. Spend the necessary time confirming all components of the settlement in order to avoid misunderstanding down the road (for example, is there confidentiality? a section 1542 waiver? liquidated damages? venue option? indemnity?). If possible, document the settlement before leaving the mediation (bring a computer with a draft agreement); you will be glad you did.

8. **Listen to the mediator**. Remember, the mediator is the only person who knows what is happening in all the caucus rooms... so listen to the mediator. For example, the mediator might suggest getting together in a joint session. While you may not fully appreciate the importance of this, the mediator does not make such suggestions lightly. If you propose a demand or offer that the mediator believes is too large, too small, or otherwise off base...listen. The mediator wants to keep the discussion going and is often the only person who knows how to do that. If it looks like the case will not resolve, use the time at mediation to narrow the issues, set up a workable schedule for the remaining discovery, and set a continued mediation date.

9. **Be kind**. Allow opposing counsel (and/or their client) to save face. Do not gloat. Shake hands both before and after the mediation. If the plaintiff has truly been injured/damaged, recognize that. You and/or your client need not accept responsibility for the injury, but an acknowledgement and sincere recognition of plaintiff's plight goes a long way.

10. **Don't be afraid to mediate early(ish).** Of course there is a certain amount of discovery that must occur before you and/or your client are comfortable discussing settlement. But don't let the opportunity come and go. Many lawsuits drag on much longer than needed due either to unnecessary discovery or inattentive lawyering. Once the initial round of discovery has occurred, get on the phone with opposing counsel. Try to agree on what additional information needs to be developed (if any) before settlement discussions can start. Your goal is to get the best result possible for your client. If you can accomplish this (in full or in part) while minimizing the cost, time, and stress of litigation, your client will thank you (and bring you repeat business).

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