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Making the Most of Mediation: Strategic Preparation for Better Outcomes

By Jeffrey M. Senger

The first step to resolving a dispute is deciding that you want a resolution. Some parties prefer to fight—at least for a while—and sometimes this is the best approach. But habit and inertia often lead people to pursue litigation reflexively and linger with it longer than they should. Settlement is usually better for everyone—provided it can be achieved on reasonable terms. If negotiation is working well and the parties are on track for a quick and easy resolution, they should simply proceed on their own. If not, a mediator can often be helpful.

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Choosing Cases for Mediation

The best cases for mediation have some or all of the following features. First, they involve disputes whose resolution would otherwise require long delays and incur substantial transaction costs. Almost all court litigation fits in this category. Second, they are matters where the parties gain value through flexibility and creativity in crafting their own settlement. Courts have limited knowledge of a dispute and few available options, which often leads to one-size-fits-all results. Third, the parties have (or could have) relationships worth preserving. Litigation tends to drive participants further apart, while a mediated resolution is consensual and focuses on the future. Fourth, confidentiality is preferable to the public scrutiny of trial. Finally, there are barriers that a mediator can help overcome. Complex issues and competing interests can benefit from focused management by a professional dispute resolver. Sometimes a party (or their lawyer) has unrealistic aspirations, and a neutral, experienced mediator can bring them down to earth more effectively than their opponents can.

When to Conduct Mediation

Research has shown that conducting mediation earlier in a case tends to yield an earlier resolution, maximizing time and money savings. Even if it does not lead to an immediate settlement,

mediation can often clarify the issues and provide insights that focus discovery and lead to resolution later. In certain cases, however, the parties can benefit from doing some work before mediation. Sometimes a dispositive motion can resolve a case without the need for trial, although such motions often have a low success rate. Other times, initial discovery is necessary to properly value a case. Parties should be targeted in this preliminary discovery, recognizing that 80% of the information usually comes from 20% of the discovery costs. One of the biggest benefits of early resolution is avoiding expensive, unnecessary discovery.

Analyzing Your Case for Mediation

Before mediation begins, analyze your case from a negotiation perspective. Start with your interests: What are your goals for settlement? Usually, this centers on money, but dig deeper. Consider timing: Could less money now be as valuable as more later? Does one side believe a future event is likely to occur that the other side doesn't? Could a smaller amount with certainty be worth as much as a potentially larger amount that included a component of risk? Trading on differences in party perspective can yield settlements that are more valuable to one side than they cost the other. Do you have any interests apart from money? Consider other business issues, confidentiality and future relationships. How would you rank your interests if you could not achieve them all? Consider your opponent's interests. From their perspective, what are the must-haves and the nice-to-haves? Recognize that to satisfy your interests, you will need to find a resolution that they believe satisfies theirs as well.

Spend time developing creative options to meet these interests. Court awards are usually limited to cash payments, but mediated agreements can be much more flexible and ingenious. Identify legitimate criteria you can use to support your requests. What is fair market value, and what have other courts done in similar cases?

Assess your alternatives. What is likely to happen if you don't settle? Can you improve your backup plan? What is the other side's best alternative? This analysis will reveal the leverage both sides have and inform your bottom line, identifying when you should walk away from a deal.

Risk analysis can be useful. If you have a 50% chance of winning a $100,000 trial verdict, economists would say the expected value of your claim is $50,000. If you also have a dispositive motion with its own 50% chance of success, your overall probability of victory rises to 75%, making your expected value $75,000. But if the costs of litigation would be at least $25,000, your claim would net you only $50,000, so you should settle if you can get more than that.

If the other side agrees with these odds and faces similar costs, they should pay up to $100,000 to settle (the $75,000 expected value plus their own $25,000 in costs). Thus, any settlement for more than $50,000 but less than $100,000 should leave both sides better off. This is the zone of potential agreement. Experienced mediators do this work all the time and can provide more sophisticated analyses.

Communicating With the Mediator

While you are forbidden from talking privately with the judge before trial, you should always talk to the mediator before mediation. Good mediators will request this, and you should suggest it if they do not. Tell them why the case has not settled and what you believe will be necessary

for mediation to succeed. You are paying for the mediation, and it is entirely reasonable for you to participate in structuring it. Be clear if you believe opening statements from each side could be helpful, or if this would be more likely to inflame the parties than mollify them (as is often the case). Learn the mediator's style and preferences so you can prepare effectively. Discuss your client's perspectives to guide the mediator in dealing with them.

Submit a written pre-mediation statement as well. This is an opportunity, not a burden. Effective communication with the mediator will give you a substantial advantage, and first impressions matter. Brief the mediator on the facts, the law, the key exhibits and the procedural posture. Provide arguments for the mediator to use against the other side (the mediator can be a far more effective advocate for your position, as the other side does not perceive them as biased). To avoid misunderstandings, be explicit about anything you tell them that is confidential.

Preparing Your Client for Mediation

Decide who should attend the mediation. It is invaluable for clients with full settlement authority to attend personally so they can make prompt, informed decisions. In rare cases, they can provide delegated settlement authority to their lawyers and be available by phone if necessary. Bringing key witnesses and experts is sometimes helpful. Ensure everyone understands the process and their role. Explain to inexperienced parties that mediators often push parties regarding weaknesses in their cases. This does not indicate a lack of neutrality, as they do the same thing with both sides.

Consider Where to Mediate

Finally, decide where the mediation should occur. The offices of the mediator can be best, as no one has home-court advantage, and these facilities are usually well equipped with multiple conference rooms for all sides, video capabilities, and catering. Remote mediation on Zoom was formerly rare, but experience has shown it can be effective. It is certainly more convenient for the participants, but in-person mediation often fosters more robust communication. Meeting together in a common location can also increase focus, build momentum and motivate parties to work through impasse.

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