

THE RECORDER

ARBITRATION & MEDIATION

Building business in mediation

Seven tips on using settlement negotiations as an opportunity to build a stronger relationship with your client



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Alternative Dispute Resolution

Most legal professionals think of mediation merely as a process to settle cases, but it also allows you to work collaboratively with your client and to showcase your skills for preparation, advocacy and negotiation. Managed properly, mediation can solidify your relationship with your client and help you to develop future business. Here are some suggestions that might help.

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1. NEGOTIATION IS ABOUT COMMUNICATION

When each side is able to hear, understand and appreciate the other's position, the more likely parties are to reach an agreement. In a properly conducted mediation, the mediator creates an environment conducive to effective communication. The mediator's charge is to convey the respective parties' points of view in a way that will ensure they are received and sincerely considered. If accomplished, a settlement will result 90 percent of the time, enhancing a lawyer's standing with his or her client.

Spending a day with your client in this kind of environment can create a lasting bond. How often do you have a captive audience in an intimate setting where you can demonstrate your professional skills, interact on a personal basis and probably solve your client's problem? From a business development standpoint, you should recognize this opportunity and make the most of it.

2. TIMING FOR MEDIATION

Proposing mediation to your client is normally a positive thing because it shows you are looking for cost-effective ways to manage the litigation, but the timing is critical. Oftentimes, in the early stages of litigation your

client is upset and wants blood. Be sympathetic. If your client's competitor has just hired away your client's key scientist along with the ideas for a new product, your client will not be thinking about compromise.

3. MANAGING THE MEDIATION PROCESS

Once your client is open to exploring the mediation option, explain the process. Remind your client that it is entirely voluntary, nonbinding and most importantly, completely confidential. Be sure that your client understands that, unlike at trial, he retains control over the outcome. The mediator does not make the final decision; they work to create the opportunity for the parties to do so. Involving your client in selecting the mediator is a good way to connect. You can demonstrate your knowledge of the case and the appropriate person to mediate it. If your client has participated in the selection and the mediator measures up to your assessment, your credibility, and that of the mediation process, will be enhanced and your client will come away with a positive reaction, whether or not the case settles.

4. INVOLVE YOUR CLIENT

Most clients like to be involved, and

want to have input, in preparing for and participating in the mediation session. By seeking your client's collaboration, not only will you gain the client's appreciation but you will also frequently gain invaluable insights from him. If nothing else, having relayed the information and knowing that it has been received will raise your client's confidence in you. Solicit ideas from your client and get his reaction to your plan to manage the process. This back-and-forth will unify you as a team and give your client tremendous comfort. He will learn just how important you are to achieving a satisfactory result. At the very least, you should establish with your client the strategy and the tactics for the mediation.

5. PREPARE A MEDIATION BRIEF

Let your client see a draft, and solicit input. You should allow enough time for your client to reflect on the matter so that the offer for suggestions is perceived as sincere. In that way, you may even obtain some useful information. On the defense side, many clients, like in-house attorneys and insurance adjusters, are skilled negotiators as well as knowledgeable about the realities of litigation. Soliciting their input and using it is not only being helpful, but it conveys your respect and appreciation of your client, which assures that you can be effective collaborators in attempting to negotiate a settlement as well as managing litigation if the case does not settle.

6. PLAN FOR MEDIATION, PLAN FOR LITIGATION

Throughout the process, remind your client that what you need to do

to maximize your leverage at the negotiating table is far less than what you would have to do to win at trial. You and your client must decide what you will need for the mediation and then, if the matter does not settle, what you need to do to get ready for trial. Equipped with a budget, you can demonstrate to the client how you are using mediation as a cost-effective way to manage the litigation. If the case does not settle, no doubt your client will blame the other side, enabling you to do whatever is necessary to win at trial. In any pre-mediation conferences with the mediator, consider inviting the client to participate. However, understand that if the client is involved, to maintain symmetry, the mediator will

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have to invite the other party, which could be problematic. You can always ask for a private conference with a mediator, providing your client an opportunity to get acquainted with the mediator and to elevate your client's comfort level with that these discussions will be treated as confidential.

7. STAY CONNECTED WITH THE CLIENT

During the mediation session, look for ways to engage your client and

foster your relationship. As you know, there can be a lot of "downtime" when the mediator is meeting with the other side. Use this time productively to learn about your client's interests and things you have in common. Look for opportunities to share your own attributes and personal background. Spending time with your client, where you are both trapped in a conference room, is a bonding experience. Always be aware of your client's needs and make sure they are met, whether they are process-driven or personal. In essence, make sure your client is comfortable. This will foster communication, enhancing the chances for settlement, and it will strengthen your professional and personal relationship.

Ultimately, mediation is a fluid and flexible experience. By focusing on your client as part of the process, your prospects for success in mediation and for future business are likely to be enhanced.