



Prepare Your Client for Success at Mediation

By Lucy Chernow Brown
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The attorneys most likely to experience a successful mediation prepare early and effectively. Perhaps the single most important pre-mediation step you can take is to prepare your client for success, helping him to understand and trust the mediation process. Ideally, by the time mediation takes place, your client should be ready to work toward resolution by effectively participating in building a positive atmosphere of collaboration. Of course, this is often far from easy, especially if you are mediating close in time to your trial date, after a lengthy period of contentious discovery and motion practice. However, once your client thoroughly understands the benefits and the meaning of successful resolution of his issues without the risks and anxiety of trial, he can help you achieve his goals by working effectively with you during the negotiations throughout the mediation process.

Fully explain the mediation process, including opening statements, confidential caucuses, and the fact that many mediators find it effective to meet with different groups of lawyers and/or

clients at different stages of the process. Tell your client in advance that mediations are very often more lengthy than might be expected, and that he may spend some time waiting while the mediator works in caucus with the other side.

Initially, recognize that many, if not most, clients have intense emotions wrapped into their litigation cases. Over the course of my twenty-four years on the circuit bench, I have learned that even the most sophisticated business clients can become so trapped in the powerful emotions and the personalities involved in their litigation cases that they completely lose sight of the practicality and even the reality of their disputes. As a mediator, I have seen this particular obstacle deprive more clients of the chance to achieve success at mediation than any other.

While it is not likely that you will be able to erase or overcome strong client emotions, the lawyer skilled in preparing her client for success at mediation will use her persuasion skills to convince the client of the wisdom of temporarily setting aside those emotions to marshal all his brain power, creativity and energy into achieving resolution and closure. Remind your client that

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working hard to reach a collaborative resolution will not negate his final option for a trial if the parties are not able to agree on a settlement.

Work to help your client understand the perspective of those on the other side of the case. Ask him to keep an open mind and pay very careful attention to the opening statement made by the other side. Make certain your client recognizes the weaknesses as well as the strengths in his own case, despite the convincing-sounding opening statement you expect to give, glossing over those weaknesses. It is vital that your client appreciate the fact that, hard as you will work for him, there is no guarantee of a favorable result at trial. Point out the benefits of an immediate and final disposition. Encourage him to appreciate the benefits of a voluntary, confidential, definite and final settlement of the dispute.

While maintaining confidence in your case, give your client a realistic view of the evidence. Review all significant evidentiary issues likely to come up, and help the client appreciate the weaknesses, as well as the strengths, of your position on each element of evidence you expect at trial, both for and against your position. Discuss how your trial strategy may need to be changed should the evidence on which you plan to rely be excluded by the judge, or if other pre-trial rulings are not favorable to your side.

Before mediation, it is essential to have an open and frank talk with your client about money. Make sure he truly understands each of the specific categories of costs associated with taking his case through a trial and appeal. Explain all possible outcomes with respect to attorney's fees and costs for which he may be responsible on both sides of the case.

It is only fair to give your client a realistic picture of what success at trial may look like for him, in dollars that he will ultimately pay or receive. Likewise, prepare him to keep an open mind to consider the analysis of the experienced mediator. Do your best to avoid his coming to the mediation with unrealistic expectations. If, despite your best efforts, you see that your client continues to view his case in an unrealistic manner, you should consider a brief, confidential pre-mediation frank discussion about this with your mediator, who can help expand your client's perspective.

A properly prepared client will appreciate that a successful resolution of his case at mediation can beat a "win" and appeal following an expensive trial.

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