Mediation Magic

BY FRED R. BUTTERWORTH

There may or may not be something magic about mediation as a legal process. Just in case magic is a factor, there are some basic fundamentals for the lawyer preparing to represent a client to consider. In order to assist in making the job easier, it seems reasonable to break down the approach to preparation into three separate steps. Initially, is the attorney's own preparation; next, the preparation of the client; and finally, the preparation of the mediator.

Preparation Basics

As always, a clear understanding of your case facts begins the process, closely followed by an understanding of what you and your client want to accomplish. Remember in your planning that mediation involves a wise use of compromise. Selecting a mediator is important and should be based on reputation and ability to resolve disputes. Obviously, all mediators are different, but remember, it is not a popularity contest — results should count. In your planning, remember the mediator as a neutral has one objective in mind — to settle the case on terms fair and agreeable to both parties. You should include this in your preparation and use it to your advantage. Make sure that you are in a position to evaluate both your strengths and weaknesses and are prepared to discuss them in the mediation. Legal issues can be important, so be aware and do your homework. It's not a good idea to have a legal matter raised that you are not able to deal with.

If you are an aggressive, hard-hitting, take-charge personality, take the time to evaluate how that is likely to play out in the mediation setting. Remember, it's your client's case, not necessarily a showplace for your talents, wonderful as they may be. Make sure you know what the mediator's views are about giving opening statements at the initial meeting. Many, if not most, don't want such a statement. You don't want to waste time if it's not necessary.

Do you have a good understanding of the other side's position, and if so, have you figured out how to deal with their positions? This doesn't call for guesswork. You must be certain you understand what you will face at the hearing. Depositions and discovery do have a place in preparing for the mediation, so use them if you think it necessary.

When to Mediate

Another area that needs your attention is the oft-asked question, "When to mediate?" The easy answer is "when you and your client are ready to proceed with a sense that success is a realistic goal." This can be before you have filed a claim or right up to the time a jury or judge is ready to make a decision. Considerations would be to make certain that the facts and issues are properly in order; witnesses, if any, have been interviewed with statements or affidavits; and your client is available and comfortable with proceeding. Economics must be considered in terms of how much you can save in fees and costs by early scheduling.

The idea is to have the mediation when you sense it will be most likely to result in resolution. Keep in mind that the settlement numbers in mediation can be reasonably counted on to be in the 80-to-90 percent range.

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Confidentiality is an important part of mediation and must be respected. In your preparation, be sure to explore areas in your case where confidentiality may apply. If there are areas that fall into this category, make certain to include them in your preparation and advise the mediator in a timely manner. In providing information to the mediator, you can submit a separate letter dealing only with facts you do not want revealed to the other party or counsel. In the same vein, when dealing with facts or issues raised during negotiations and in caucus that you feel are important, remember that opposing counsel, parties, and the mediator are going to rely on the information you provide. They form the basis for discussion and are going to be part of the plan to resolve the case. A word of serious caution: Dropping new facts, issues, or demands into the discussion, taking everyone by surprise, is not an acceptable tactic. Changing the deal in mid-stream generally leads to the conclusion that you are not negotiating in good faith and often leads to unsuccessful results. Part of the ability of the process to work is based on the mediator having all the important facts and issues, and being able to rely on them. Withholding relevant information at any time is certain to damage the process.

In the Beginning

Generally, most sessions begin with a gathering of the parties and counsel in the same room, even though there are no "opening statements." Other housekeeping concerns are considered, and it also compels the litigant's counsel and other representatives to begin in a face-to-face setting. Often the mediator has issues and questions that are best resolved in a joint session. Your responsibility is to make a determination if such a joint meeting will be detrimental to settlement, and having the parties in the same room would not be advisable. If you believe that to be the case, discuss it in advance with opposing counsel and the mediator. Along the same line, it is probably a good idea to have had at least some minimal discussion about the case with opposing counsel. Arriving at the mediation without having had any meaningful discussion is not an absolute roadblock, but it is probably not conducive to success.

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The question of *who* should attend the mediation should be considered. The best answer is anyone who has a personal or economic interest should attend. There really should be no exceptions to this rule; however, there are some circumstances that force parties to circumvent the ideal. Often the defendants represented by counsel and insurance companies do not appear unless there are factual or liability issues compelling their attendance. More difficult is the insurance carrier that opts to not send representation or elects to be "immediately available by telephone." Assuming the "purse" is not present, or available only by phone, is not the least bit helpful and deprives that party of the benefit of the give-and-take of the negotiation process. It tends to indicate to the complaining party that their issues are not very important, which again increases the workload for the mediator. In preparing the case, you should know who is going to be present and who is not.

Can you, or should you, even consider discussing your case during the mediation with the mediator? You can, and you should, if, in your opinion, the situation calls for such a discussion. What about the client in such a situation? Be honest and forthright — it may hurt a bit at the time but may well aid in the settlement process.

Client Preparation

It is always said that mediation is the client's process and an opportunity to participate directly in resolving their dispute. This is true. Thus, make very clear to your client that you expect him or her to be active in the discussion. This means they must be well aware of all issues, good and bad, that will be involved. Discuss the confidentiality aspect of mediation and assure your client that it is important to take advantage of its availability. Don't forget to explain that "neutrality" means that the mediator is not on anyone's side — someone who is not specifically a decision maker but a person facilitating the settlement as it proceeds.

The question of unreasonable expectation can be a problem. Here, the assumption is that you, as counsel, are realistic and not guilty of such thoughts. This demon most often arises in the negotiation process, where in the course of events an insulting offer or demand is made.

Prepare your client for such an occurrence, remembering that the whole exercise revolves around give-and-take, compromise, and good-faith efforts to resolve the dispute. Try very hard to avoid either you or your client "digging in your heels" and uttering, "We want a judge." That kind of position might distress the mediator and often leads to an impasse. When this happens, it requires everyone involved to use creative imagination and try harder.

Lawsuits involve many things a nonlawyer might not think of or might not understand — an investment of time, emotional commitment, risk and uncertainty, expense, and unsatisfactory results, as well as the trial itself. The

mediation process in many ways feeds off of these real issues involved in pursuing litigation. One by one, problems with going to trial can be eliminated or reduced in a successful mediation. Your client should be aware that only in mediation can they, by their own participation, control their destiny in a much more direct fashion than either trial or arbitration.

Your client should also be aware of all submissions you make to the mediator. Finally, the objective is to settle the case, so make certain your client is on board with that goal in mind and is willing to work hard to achieve resolution.

Mediator Preparation

The neutral will expect a letter or memo with appropriate attachments that sets forth your facts and what you want to accomplish. Keep it reasonably short and include only a minimum number of attachments. Assume that your mediator is experienced and will be able to review your material and be prepared to assist in resolving the case. It is helpful to include the trial date, estimated amount of time of the hearing, the name of the judge, and any settlement numbers that have been discussed. Material should generally be exchanged with opposing counsel unless there is a very compelling reason not to do so. The exchange brings everyone to the table with the same information and lessens the time to make sure everyone is working on the same problems.

Ex parte communications with the neutral are not forbidden, as they are in arbitrations and trials. The mediator is not considered a decision-maker and in most cases will advise opposing counsel of the fact of such exchanges, although not necessarily the subject that was discussed. It is incumbent on the mediator to maintain his or her neutrality, so anything that brings that into question should be avoided.

Mediators vary in their individual approach to resolving disputes. Some are very aggressive and ready at any time to express their opinion or liability, value, and settlement solutions. The more typical neutral tends to place emphasis on the participation of the parties and the natural flow of negotiations. If you and your client are more interested in having the neutral's opinions up front and are willing to forego the give-and-take of negotiations, you might consider arranging a settlement conference where someone will tell you what is necessary to settle the matter. At best, you should make a reasonable inquiry about the style of the neutral you select.

It would be a good idea to give some thought in advance to the settlement agreement you would anticipate if the matter is resolved. This is particularly true if the case is complicated. Maybe even a rough draft. At the conclusion of a successful mediation, a document outlining the resolution in detail should be prepared and signed by all parties and all counsel. This is imperative. Insist that no one leaves the session without such a document, even if it is written in longhand.

In the instance that the agreement is rough, written in longhand, or otherwise not the perfect document you would probably prepare in your office, think twice about including language that indicates it will be cleaned up and made legalistic and formal at a later time. This can lead to second thoughts, changing more than the style, and trouble. If this is deemed necessary, then counsel must make clear precisely what additions and "cleaning up" mean.

Consider the client who, for one reason or another, refuses to be reasonable. The mediator should be a part of the solution to this dilemma. Hopefully, during the negotiations, some respect and rapport have developed among you, your client, and the neutral. This may be the time when the neutral's opinion or specific recommendation should be requested. Rest assured, the mediator does have his or her own views on a reasonable outcome and, when asked, will probably be willing to express them. This should not impair their impartiality; rather, it's an informal expression of reality which, coupled with the mediator's credibility with your client, often is significantly impressive enough to resolve the impasse.

Finally, it is probably not all that helpful to be overly sensitive to what may appear to be slights or failure of the other party or counsel to agree with every position you present. In other words, be patient and optimistic. Don't constantly tell the mediator that you have "had it" or that you're leaving because it's not working or making progress. Make every effort to assure the neutral that you and your client are working together to achieve satisfactory results.

Hopefully, this article will be helpful both in preparing for your future mediations and encouraging your clients to seek mediation of their disputes.

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