

How counsel can make or break a settlement

By Larry Mills

Counsel's efforts and skills in a mediation have a significant impact on the prospect for settlement. Following are tips for attorneys that can improve the likelihood of a successful mediation.

Know the case and the interests of the parties. A favorable result in mediation is a direct function of the quality of your factual and legal analysis and your ability to advocate your client's position in a persuasive manner. It is also important to identify your client's needs and interests and to consider the opposing party's needs and interests.

Attempt to negotiate directly before mediating. There is nothing more frustrating in mediation than beginning the day with an overreaching demand and a low ball offer merely because there have been no prior negotiations to establish a reasonable range for discussion.

Mediate as early as possible. Discovery is the most expensive phase of the litigation process. You will benefit from developing a discovery plan that focuses on obtaining the basic information to set the stage for mediation. Early mediation promotes resolution before the parties incur significant litigation expenses, which can be an impediment to a later settlement.

Carefully select the mediator. Although the best mediators adapt their approach to the needs of the case and the personalities of the parties, a mediator who is well suited for one type of case may be the wrong choice for another. Research your mediator's

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background, experience, and style. Interview the mediator and consult with other attorneys who are familiar with his or her work.

Include all necessary participants in the mediation. Make certain that all decision-makers are present and can participate in the mediation conference. Client representatives and those of the opposing party should have appropriate authority to evaluate and develop settlement proposals and enter into a settlement agreement. Ensure the client representative can communicate with superiors during the mediation if additional settlement authority is needed.

Prepare the client. In a pre-mediation conference, explain the mediation process and the role of the mediator, pointing out that the mediator is not empowered to decide the outcome and is not



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likely to render an opinion about who is right and who is wrong. In particular, the client should understand that a good mediator will ask both counsel and the client questions in an effort to understand the interests underlying the dispute and the impediments to settlement. Discuss candidly the strengths and weaknesses of the case and the likely range for possible settlement. The client should not hear bad news for the first time from the mediator.

Share mediation brief with the other side. Sharing the pre-mediation memo with the other side is crucial to a successful settlement. The more each side knows about the other's position, the more likely the dispute will settle. It's also important that both sides share their briefs early so everyone has the opportunity to review and evaluate them. If there is any information that a party does not want to disclose to the other side, that information can be included in a separate memo submitted confidentially to the mediator only.

Actively shape the mediation process. Contact the mediator confidentially before the day of the mediation conference to suggest the structure of the mediation process. For example, if it is important for the client to communicate directly with the opposing party, the mediation could begin with a substantive joint session in which each side will have the opportunity to communicate its views to the other. If this would be detrimental to the process, suggest starting with "private caucus mode". The mediator will fashion a fair process with due regard for each side's concerns.

Plan your opening offer and negotiation strategy. Mediation is merely a facilitated negotiation that often takes on the characteristics of a poker game. Plan the opening offer to convey to the other side a sincere interest in settling the case, while leaving room for future movement. Give careful consideration to the opening offer and the opposing side's likely response. This allows the parties to think several steps ahead in the negotiating process and plan future moves to produce momentum toward settlement.

Evaluate settlement offers realistically. It is better to think in terms of settlement ranges and approach the mediation process with flexibility. The client should expect that give and take will occur during the mediation and parties' settlement positions will change. Importantly, make clear that neither party can expect victory in mediation. If settlement is achieved, a party's most optimistic expectations are unlikely to be realized.

Develop settlement options. One of the strengths of mediation is that it allows the parties to lead the way in developing creative settlement options. As the mediation proceeds, you and your client should be active listeners, seeking signals from the other side regarding flexibility and possibilities. Throughout the mediation you need to ensure your client understands the possible and probable alternatives to a negotiated settlement. Cases settle because the parties choose the certainty of the agreement reached in mediation over the uncertainty of resolution at a trial or arbitration, as well as the costs in money, time, and emotion of continuing the dispute.

Close a successful mediation with a written settlement agreement. When a settlement is reached, document it before leaving the room in a written settlement agreement signed by the parties. A handwritten, binding agreement summarizing the key business points and signed by the parties may be sufficient. If a more comprehensive, typewritten agreement is important to the client, come to the mediation with a draft agreement on a laptop with the language of certain essential boilerplate terms (confidentiality, appropriate releases, dismissal of a lawsuit). If further documentation is still required, consider agreeing that any disputes over the formal documentation of the settlement be resolved by binding arbitration with the mediator serving as arbitrator.

Effective advocacy in mediation requires a significant commitment of attorney time and effort that pays dividends in a better outcome and client satisfaction.

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