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Three Secrets to a Successful Mediation: Preparation, Preparation and More Preparation

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During my 23 years as a magistrate judge and my time at JAMS, I've conducted thousands of settlement conferences and mediations. Settlement conferences and mediations play a vital role in the resolution of disputes. In 2019, less than 1% of the civil cases filed in federal courts were resolved by trial (Federal Judicial Caseload Statistics 2019, Table C-4, U.S. District Courts: Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending Dec. 31, 2019; available at www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019).

While no one can control all of the elements that lead to a successful mediation, thorough preparation by counsel, the client and the mediator can increase the likelihood of a productive session. While the current pandemic conditions persist, many, if not all, mediations will need to be conducted remotely—a procedure that has its own challenges and limitations. Given these additional obstacles, thorough preparation—controlling what we can control—is all the more important. As Ben Franklin observed, "By failing to prepare, you are preparing to fail." So preparation is paramount. Here are some specific issues that each of the participants in a mediation should consider:

Counsel

Prior to the mediation, counsel should gather all the information necessary to participate intelligently. Although one of the benefits of mediation is the avoidance of expensive discovery, limited discovery is frequently necessary so that the parties can make informed decisions. Where damages are quantifiable, damages calculations should be exchanged and backup provided prior to the mediation under a stipulation that the information is to be used for the mediation only. Where recovery is sought for expenses that can be documented, counsel should include that documentation, as it is unlikely that a defendant will issue a check without it.

Most mediators require the submission of a pre-mediation statement, which, at the parties' option, can be submitted on a completely ex parte basis or on notice to the adverse parties with, in some cases, an ex parte addendum to the mediator. The importance of carefully preparing this submission cannot be overstated. It is

counsel's best opportunity to educate the mediator about the facts of the case, relevant legal principles and the client's wants and needs.

If the mediation will include a joint opening session, the opening statement becomes extremely important. It is frequently counsel's only opportunity to convey the client's position, unobstructed by adverse counsel. Although the presentation should be persuasive, care should be taken to ensure that it is not so inflammatory that the other side will harden its position. Counsel's goal should be to generate light, not heat.

In advance of the mediation, counsel should learn the extent of the client's flexibility. At the mediation, counsel should be prepared to discuss the facts and the relevant law, the client's opening settlement position and the

basis for that position. An attorney's inability or unwillingness to make an opening settlement demand or offer is extremely frustrating. If a defendant lacks the financial resources to fund an otherwise reasonable settlement, counsel should disclose the evidence to substantiate such a claim to adverse counsel prior to the mediation. Other subjects that should be considered in counsel's preparation are the adversary's wants and needs, responses to the adversary's arguments and the methodology used to calculate potential damages.

Finally, if the mediation will be conducted remotely, counsel should familiarize herself and her client with the platform that will be used to conduct the conference. The videoconferencing platforms available are user friendly, and online training is available. However, without a modicum of training, even simple tasks, like turning on the microphone, can result in delays.

The Client

If the client is not familiar with mediation, counsel should explain the process, how the day will go and what to expect. If counsel has any questions concerning how a particular mediator will proceed, counsel should ask. In particular, counsel should advise the client to expect searching questions from the mediator during the breakout session and explain that by asking such questions, the mediator is not displaying bias, but rather suggesting reasons why the client should settle. Counsel should also advise the client that the mediator will be posing similar questions to the adversary.

Prior to the mediation, counsel should also have a candid discussion with the client concerning the case. As noted above, an effective mediator will identify the weaknesses in each side's case. The client's confidence in counsel and the client's receptiveness to the mediator's comments will be enhanced if the client learns of any weaknesses in the case from counsel at the outset. The discussion should also include the cost of litigation, including the non-monetary resources necessary to pursue a litigation and possible fee shifting. In addition, counsel should discuss the benefits of confidentiality and of avoiding a potentially adverse precedential decision. Finally, counsel should explain that, in addition to its other benefits, a mediated resolution offers the advantages of certainty and control.

The Mediator

The mediator should have a thorough understanding of the facts of the case and its procedural history. In some cases, this is very easy. In others, it can take a great deal of time. For example, I've had multi-party maritime and aviation disaster cases that required the creation of a detailed spreadsheet listing the parties, their counsel, their alleged roles in the disaster and their claims and defenses.

Part of the mediator's job is to explain the strengths and weaknesses of the parties' positions, as perceived by an independent neutral, and the concomitant risks of proceeding to either a dispositive motion or trial; most mediators cannot do this without thorough knowledge of the case. Second, an experienced neutral, armed with knowledge of the case, may see factual or legal issues not previously considered that may warrant a party's changing its position. Third, the mediator's preparation enhances the likelihood that he or she will be able to suggest what I consider the holy grail of a mediation: a resolution that creates real value for the plaintiff at minimal cost to the defendant. Finally, when the mediator demonstrates a thorough understanding of the case, the parties will have more confidence and trust in the mediator's comments concerning the case.

The goal of all parties to a mediation is the resolution of their dispute. Through diligent preparation, the likelihood of achieving that goal is greatly enhanced.

For further reading, see Tim A. Baker, "Sizing Up Settlement: How Much Do the Merits of a Dispute Really Matter," *Harvard Negotiation Law Review*, Vol. 24:253 (2019); Betsy A. Miller and David G. Seibel, "Untapped Potential: Creating a Systemic Model for Mediation Preparation," *Dispute Resolution Journal*, Vol. 64:50 (2009); and John P. Dolan, "How to Prepare for Any Negotiation Session: Some Basic Tips to Help You Negotiate Successfully in Any Negotiation," *Dispute Resolution Journal*, Vol. 61:64 (2006).

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