Supplement to the Los Angeles and San Francisco
Daily Journal

THE RESOLUTION ISSUE 2023

COLUMN

Maximizing the benefits of mediation: fundamental considerations for litigators and clients

BY DANIEL A. PLATT

According to the American Judges Association, approximately 97% of cases settle before verdict, and while there is no precise number it is generally believed that 80% to 92% percent of those cases settle during or shortly after mediation. Despite these statistics, many litigators incorrectly view mediation as no more than a necessary procedural nui-sance instead of as a critical tool to be used to obtain a result superior to bringing a case to trial (and appeal). In order to properly prepare for and effectively participate in a mediation, here are six key factors that counsel should consider:

1. There are no winners or losers. Litigators are trained to win cases. Mediation, however, is not about winning or losing. It is based on the concepts of negotiation and compromise and therefore requires a different frame of reference and approach. Remember, 97% of cases will settle. So, the question is simply: What result can be obtained during mediation that is better than litigating all the way through to verdict? To properly analyze this

issue, lawyers and clients must consider not only legal fees and risks, but collectability, appeals, the real timeline before the client is paid if they prevail, whether the client can wait several years (or longer) for the matter to resolve, the emotional strain on the client, and the use of personal and professional bandwidth to move forward without settlement. When considering all of these (and other issues), it typically becomes evident that structuring a deal during mediation, which can be tailored to the needs of the parties in ways that judgments often cannot, is often a better result than incurring additional fees, assuming risk, obtaining a potential verdict and years of appeals and attorneys' fees.

2. Understand the client's interests, needs and goals.

Although it may seem obvious, counsel must spend time to understand what the client's goals are via settlement, which often includes terms that could not be obtained through litigation. Indeed, some of a client's needs may not arise until settlement negotiations begin. For example, a litigant may need a letter of recommendation, a jointly prepared statement for public consumption, a designation that a party was a co-founder of a business, confidentiality, transfer of intellectual property, return of physical property or payment of insurance premiums to be part of the settlement. If counsel doesn't know about these types of issues in advance of the mediation, the mediation process can be negatively impacted.

3. Provide the mediator with all critical information.

While it is true that mediators do not need to know all the facts in a case, withholding material information or failing to fully address significant legal issues (in the mediation statement or verbally) is not a smart move. First, opposing counsel will likely raise the issue, so there is no benefit to the party withholding the information. Second, failure to raise key issues affects the credibility of the client and the lawyer, which is difficult to regain. Credibility is directly related to the likelihood of receiving a favorable response to any proposal, so instead of removing roadblocks to settlement, additional barriers are raised. Finally, and perhaps most importantly, if the issues are addressed candidly, the the mediator will not be caught off guard and can confront the issue as needed. Mediators are simply more effective when they have the information necessary to negotiate with all the issues on the table.

4. Keep an open mind.

Litigators know their cases better than anyone, often including their clients. That said, litigators also know that there is always another side (or two or three) to the story. Because counsel may not have heard the other side's story yet, or some version of it, effective participation in mediation mandates active listening and understanding. It is always helpful to learn about the adversary's legal or factual position because it may impact the client's settlement posture. Second, listening (whether directly or through the mediator) to the opposition's theories and facts provides an opportunity to refute them and further strengthen a position or proposal. Finally, when the adversary's position and analysis is understood, it provides the mediator and counsel an opportunity to tailor an appropriate and effective response.

5. Lean on non-legal advisors.

Many cases are simply about how much money one party will pay to the other. That seems simple, but it is not. Structuring deals are almost always a part of any complex settlement, and having accountants, managers and financial advisors on standby to provide tax planning and advice regarding deal structure is invaluable. Advisors can also be useful messengers during negotiations.

6. Do not block access to the client.

It is rare that a client should not interact with the mediator (with counsel present). Direct discussions create trust among the client, counsel and mediator, and aid the mediator in understanding what the client believes they need or want, and therefore how to ultimately resolve the matter. When those interactions are limited, the process becomes inefficient, can lead to confusion about who the decision-maker is, and ultimately undermines the confidence the parties have in the mediator. Of course, the lawyer can always speak to the mediator outside the presence of their client and convey anything helpful or necessary to assist in the process.

Mediation is an opportunity to advance the settlement timeline and enhance the ultimate position of the client in a manner that can be tailored to their needs in ways that judgments often cannot. Attorneys and their clients should take advantage of it and become part of the 97%.

Daniel A. Platt Esq. is a mediator, arbitrator, and neutral evaluator at JAMS. Daniel has acted as a neutral in dozens of matters involving health care payor/provider, commercial, real estate, consumer and ADA disputes. Prior to joining JAMS, Daniel practiced for more than 35 years as a trial attorney focusing on complex commercial litigation matters.