



MEDIATION ADVOCACY — COUNTDOWN TO A SUCCESSFUL MEDIATION

By Barbara A. Reeves Neal, Esq.

Lawyers and mediators sometimes fail to appreciate that a mediation requires as much advance planning and consideration of strategy as a trial. Too often, lawyers (and some mediators) pick up the file a day or two in advance (at best) and wing it, relying on their advocacy skills and smarts to negotiate their way through the mediation day. This approach does not serve the needs of everyone involved. By using the following mediation countdown, everyone will come to the table prepared.

1. Develop a Timeline

Using the tools below, if you are counsel representing a party, decide when you want the mediation, and then plot your timeline just as if it were a trial date. List all the tasks you need to do: prepare case analysis; educate clients on the mediation process and their role; and identify client positions and those of the other side. Be sure to allow for significant trial events and dates or any post-session follow-up.

2. Selection of the Mediator

Do not restrict yourself to the mediator your colleagues have always used – ask them whether their recommended mediators got the matter settled to their satisfaction. Ask whether they and their client enjoyed, or at least appreciated, the process with that mediator. Consider agreeing to a mediator recommended by the other side – presumably that is someone to whom they will listen.

3. Talk with the Mediator in Advance

Pre-mediation communication with the mediator ensures that there are no last-minute surprises in terms of which parties will attend and the format or process to be used.

4. Identify the Right Participants

Select a knowledgeable client representative who has the authority to settle the matter, even if it takes some creativity. Then ask the other parties who their representatives will be. They may think this, although they should. If one party feels that the other's representative is not knowledgeable or does not have authority, they may not listen to anything coming from that side of the table. If there are multiple parties on one side of the case, they should definitely confer about their representatives.

5. Risk Assessment Steps

Objectively evaluate the best result, worst result, and other potential scenarios and spend time making sure that all the decision-makers and client representatives understand the evaluations and agree with them. If there is a difference of opinion amongst client stakeholders, this must be addressed so that mediation counsel and the mediation representative have clear direction.

6. Timing

You will learn a lot about your case and your opposing party's case in a well-managed mediation. This information may lead you to want more discovery or to reevaluate your position. Therefore, do not wait until the close of discovery or the eve of trial to mediate – if it does not settle, you may need time to adjust your strategy. Similarly, although mediating before discovery commences can save a lot of attorney fees that would otherwise be spent on discovery, mediating without sufficient information will cause one or both parties to be afraid of committing to a settlement. Discuss with the other party and with the mediator information that you need in order to evaluate

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your settlement position, and see if you can reach an agreement for an informal exchange of that information in advance of mediation position.

7. Multi-party and Missing Party Issues

In a complex case with numerous issues and parties, consider mediating among all parties for a global settlement, or taking it one bite at a time on a per issue basis or among a limited number of parties. Are there any hidden participants who should be at the table, but are not? The increasing use of litigation funding often means that there are investors who are fronting litigation expenses in return for a share of the result. If they are not represented at the mediation, you run the risk that they will not understand the dynamics of the case.

8. Know Your Opening Move

Decide on your opening move before you get to the mediation, and understand what message you intend to convey with that position. Put it in writing and discuss it with your client so that no one is fumbling when it comes time to make your initial offer or demand.

9. Plan Your Closing Alternatives

Identify settlement objectives in writing, with an optimistic “stretch” objective, as well as a realistic what-you-would-settle-for objective.

10. Bring a Settlement Draft with You to the Mediation

Drafting a settlement agreement after a long tiring day of mediation leads to grumpy lawyers and mistakes. Bring your draft settlement agreement with you to the mediation and revise it as the day progresses to reflect different provisions under discussion.

11. Follow-Up

It's not over until everyone gives up. If the case does not settle at the initial mediation session, follow up with the mediator by phone and even schedule another session. The dynamics of the case or the interests of the parties may change over time.

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