Maximizing Mediation:

Strategies for Effective Case Resolution

By Commissioner Bradford G. Moore (Ret.)

Insights from a JAMS neutral on common pitfalls and practical preparation techniques to achieve successful settlements

What can we do to get the most out of mediation?

Almost all civil cases resolve without a trial.[1] As a judicial officer, I saw many cases that clearly could and should have been settled but came back to me after a "failed" mediation. As a litigator, I participated in well over 100 mediations. And as a mediator at JAMS, I often see the same mistakes I made as a practitioner get in the way of successful settlements. If settlement really is the most likely outcome of virtually every case, shouldn't we put as much (if not more) planning and preparation into a mediation as we do a trial?

This article explores some ways to get the most out of mediation by recognizing that, like a trial, identifying potential problems in advance and preparing for them is the path to success.

Prior to the mediation session

Pay attention to when to mediate. Are there undiscovered facts negative to your case that make it advantageous to my client to mediate now before the other side finds them out? Are there key legal issues that will impact the trial or even whether it happens? Too often we say yes to the idea of mediation just because the other side proposes it.

Some minimal offer/counteroffer before mediation makes the mediation session much more likely to be productive. The $1 million demand followed by the $20,000 response wastes valuable time at the mediation.

Provide the other side all necessary information to evaluate your case. Refusing to provide a copy of your mediation letter to the other side almost never makes sense and forces the mediator to use valuable time to try to educate the other side about your case and your issues. Sensitive or "secret" facts or trial strategies can go to the mediator in a short separate confidential memo.

Be mindful of who will attend the meditation and from where/how they will attend. Most mediations are conducted via Zoom. Having the plaintiff and their counsel in the same room (as opposed to logging in from separate locations) impacts how the plaintiff evaluates the issues being raised and the plaintiff's decision-making process. Who will be there with the plaintiff, and what is that person's role?

Be clear with your client on the goals at mediation. Settlement of the case is great, but don't overlook the other benefits a "failed" mediation can produce for your client. Press the mediator to challenge the other side on key legal/factual issues as a trial preparation/motion practice assist. Getting the other side's best settlement position at mediation (even if you believe/know the case won't settle at that number) has value to the client, as well as an insurance carrier, and sets the parameters for later settlement discussions.

Identify any nonmonetary issues/key concepts well in advance. Does your client need confidentiality? Non-disparagement? Hold harmless from the plaintiff for liens/reimbursement? Don't wait until the final hectic minutes to make these a part of the settlement. Come to the mediation with a draft settlement agreement that lays out all the terms and needs only the dollar amount to complete it.

During the mediation

Identify at the beginning who has already paid what, and what the status of all subrogation and reimbursement claims is. It is not uncommon for plaintiff's counsel to appear at mediation with an unclear or incomplete understanding of what medical bills or other benefits have been paid and by whom, and/or the status of subrogation/reimbursement.

Make sure the mediator, the other side and you understand what important terms mean early on. "New money," "net," "gross" and similar terms often are used. Control the discussion by insisting that the mediator get a clear commitment by the other party to specify exactly what that party means if any of these terms are used. There is no shame in expressing ignorance and asking questions. Repeat the ultimate meaning each time an offer/counteroffer is discussed/exchanged: "I understand their current demand of $200,000 means the plaintiff will pay all liens out of that sum, and accordingly, defendant will pay that full amount to the plaintiff. Is that accurate?"

Be prepared to respond to questions the mediator will almost certainly ask at some point:

What are the costs your client/insurance carrier will face from here to trial (fees, experts, etc.)?

What are the weak points of your case?

How are you going to deal with the key legal issues you know the other side (and mediator) is going to argue, such as dead man's statute, privilege and parol evidence. Have a clear and detailed approach to handling these. Not only is the legal argument important; it is as (and maybe more) important to demonstrate that you have taken these issues into account in your settlement evaluation. Why not complete the memo/brief on the key issue you will use at trial and give it to the mediator when you are asked how you will handle that issue? Remember that the goal here is not to convince the mediator to tell the other side it will lose at trial in the face of your compelling legal arguments. The goal for the mediator to make clear to the other side that you are ready to try the case. Simply saying, "We're ready to go to trial today," is not enough; everyone says that at mediation. Demonstrate that willingness by having all key issues identified, briefed and addressed at mediation.

Be sure to ask about and comprehend the consequences of your client taking a specific action that the mediator proposes. "If my client agrees to raise its offer to $100,000, do you have authority from the other side to settle the case at that amount?" Or "If my client comes down to the number you are suggesting, what will the other side do?"

Understand the consequences of ultimatums and use them wisely and sparingly. Saying something like "Go back to their room

and tell them this case will never settle for six figures" often feels necessary at some point, but it can back the other side into a corner. It gives the other side only two choices: reduce their settlement position below your number or go home. There are cases where that either/or dilemma presented to the other party can be useful (for example, an in experienced opposing counsel likely unwilling/unable to take the case to trial). More often, this type of ultimatum brings the negotiations to a halt.

At settlement/after the mediation

Include and define, if necessary, all key terms in the CR2A agreement. Parties and lawyers are often exhausted at the end of a long mediation day. Insist that the agreement is signed by all parties before anyone leaves.

Have a clear concept of what will happen next and who will do it. Is a more detailed formal settlement agreement and release needed? If so, who is going to prepare it? If there are disputes about any necessary next steps, how will those be resolved? By returning to mediator? If so, will the mediator mediate or act as arbitrator? Include all of this in the CR2A agreement.

Know what the next steps will be if no settlement is reached. Will the mediator continue to reach out to the parties? When? How? Will the mediator charge for any additional time?

Virtually every case is going to settle or end short of trial by summary judgment or other dispositive order. Settlement by (or after) mediation is how lawyers can have a significant impact without the uncertainty of a judge's ruling. The suggestions in this article should increase your chances of moving the mediation in ways that promote settlement and your client's interests.

Bradford G. Moore (Ret.) serves as an arbitrator, mediator, special master/referee and neutral evaluator, handling business/commercial, class action, insurance, personal injury, estate/probate/trust, family law, professional liability and real property cases. Prior to JAMS, he served as a court commissioner in the King County Superior Court Ex Parte Department.

[1] Nationwide, civil cases reach a jury in less than 1% of filed cases. "Reasons for the Disappearing Jury Trial: Perspectives From Attorneys and Judges," *Louisiana Law Review*, Volume 81, Number 1, Fall 2020.