Why Mediation? Taking the Leap of Faith

By Patrick Campbell Coughlan

You are a trial lawyer. That is what you have been trained for. That is what you like doing. So you ask yourself, Why mediate? The answers to that question are myriad. One thing to note is that mediation has never been more popular than it is today with trial lawyers of every specialty, so there must be explanations for this. Whether your dispute is complex and catastrophic, with numerous parties, or relatively simple, with two people in disagreement, there are common reasons to mediate in almost all disputes:

- To maintain control of your dispute and the privacy of your negotiations. Nothing is binding in mediation until the parties reach an agreement. All discussions are privileged and inadmissible in any court proceeding. The process is confidential and closed.
- To manage your risk and control your expenses. Litigation is time-consuming and inefficient. Mediation, on the other hand, saves many hours and thousands of dollars. It allows you to control your own calendar. It behooves us to remember that 95 percent of all civil cases ultimately settle out of court, but only after a significant expenditure of energy and dollars. With mediation, you can likely achieve the settlement with less cost.
- To give you a vote in the outcome of your case. Mediation helps bring clarity and focus to your positions. It separates the people from the issues, and it allows you to participate in crafting a resolution.
- To unload old or stalled cases. Mediation brings uncooperative parties together and empowers them to create more options for settlement.
- To settle your case.

Preliminary Considerations

To be effective, attorneys must understand what mediation is and is not. It offers participants a confidential and nonbinding process in which they can explore the possibilities of settlement. It does not make sense when legal principles are the paramount issues needing resolution. Nor does it make sense when delay or cost is not an impediment to litigation. Mediation works most effectively after the parties have had an opportunity to understand their cases and at least have completed preliminary depositions of key witnesses. Although parties often learn a great deal about their case and their opponent's case during a mediation, mediation is not meant to be used—and should not be used—as a form of discovery.

Preparation is essential for a successful mediation. A lawyer should prepare for a mediation with the same dedication and enthusiasm as he or she prepares for trial. An in-depth understanding of the law and the facts surrounding the litigation are essential to reaching an appropriate settlement. The more you know about your case and your opponent's case, the more effective you will be when the mediation commences. The parties must clearly understand their case, understand the problems with their case, and have a clear understanding of their opponent's position.

Before a mediation commences, an attorney should counsel his or her client about the mediation process and ground rules to determine if the client has a good faith interest in settling the case through negotiation and compromise. The client must have an actual intent to reach an agreement, to let the mediation progress with his or her mind open to new possibilities. Because of this and other reasons, it is important to determine if both parties and counsel understand the case well enough to negotiate intelligently.

The most important decision an attorney has to make to ensure a successful mediation is to select the right mediator. Most attorneys intuitively understand that a mediator should be impartial, objective, credible, honest, tactful, a good listener, patient, persistent, candid, flexible, and imaginative. However, too few attorneys focus on the mediator's style as an important element in settling a case.

Mediators who give up on the mediation after a few hours because the parties are too far apart do not help the process. The mediator must remain optimistic and positive throughout the mediation. It is important for the mediator to help the participants through impasse and conflict. The longer a mediator can keep the parties "in the room," the more likely a

case is to settle. Parties develop a vested interest in achieving a resolution when they have spent hours working toward a settlement.

Another thing to remember is that good mediators are expensive—you get what you pay for—and clients should feel that they are getting value by choosing mediation. However, do not decide on a mediator based on his or her costs. Most successful mediators have settled hundreds of cases and have a reference list that can and should be checked by any attorney considering mediation.

Historically, mediators are trained to be facilitators and message carriers. However, experience has shown that these traits often fail or hinder the settlement of a case. Mediators who are diplomatic, patient, demonstrate a sense of humor, and help the parties evaluate the strengths and weaknesses of their positions in litigation achieve the greatest number of settlements. You want a mediator to whom the other party will listen and who will project confidence that he or she understands both parties and their competing needs. Successful mediators tend to have a more hands-on and evaluative style. They focus the parties as well as express opinions as to the probable results of the litigation. The more evaluative mediators push the parties to look at the law and facts in a more realistic manner.

Parties with decision-making authority should attend the mediation. Successful mediations occur most often when a party or representative with full settlement authority is present on each side. Although it is unrealistic to expect a president of a Fortune 1000 company to attend a mediation, his or her representative at the mediation should be far enough up the "food chain" that his or her recommendations will be taken seriously by corporate decision makers.

Getting Down to Business

You have made up your mind: you're going to mediate. You have agreed upon a mediator and established a time and place for the event to occur. At this point, you should remind yourself that the single greatest impediment to successful mediation is lack of patience. Sufficient time should be set aside to allow the process to work. Whether the mediation proceeds quickly or slowly is substantially up to the parties involved, but experience shows that patience and determination result in settlements. A seasoned mediator with a track record of settlements should be able to guarantee that he or she will settle the case if no one leaves the premises. To set enough time aside for mediation, it is important for the parties to think not only about the presentation that they wish to make in front of the mediator and the other party, but also about the presentation that their opponent will make. Large cases with complex facts and legal positions often require two or three days to achieve a settlement. However, too much time set aside for a mediation can be as much a problem as too little time set aside. Before the mediation, the parties should discuss by telephone with the mediator their realistic expectations concerning the process and the time needed for their case.

One starts the process by exchanging written briefs with opposing parties before the actual meeting. These briefs offer each side the opportunity to present its position in a clear and forthright narrative. Your brief may offer the first opportunity for the opposing client to understand both its case and yours. Briefs should be written as much for the opposing client as for the mediator. Important sections of exhibits should be highlighted or tagged for easy recognition. Files of exhibits that are not indexed and marked can be useless. If the clients have some confidential matters that they wish to disclose only to the mediator, those can be handled in a separate, confidential document.

At the mediation itself, both parties will have the opportunity to make a brief presentation that summarizes their positions, the legal points, and the damages being sought in a case. In cases involving large amounts of money, the presenter must help the other side understand the rationale in reaching the numbers being presented.

During these presentations, a party should take the opportunity to talk directly to the opposing client without being overly aggressive. Your goal is not to make friends with the opposing client but to help him or her understand that you are not an unreasonable or vindictive person. Nor is it to placate him or her. Rather, you need to impress upon the opposing client that you are at the mediation because there are important legal and factual issues to resolve. It is helpful to indicate that you have come with an open mind and with the intention of being fair, and that you hope both sides will listen to what is being said without prejudging the outcome.

After the presentations are completed and the parties separate, they often will be placed in discrete rooms adjacent to the meeting room, where they will have the opportunity to talk confidentially with the mediator in private sessions. Attorneys should be direct, forthright, and honest with the mediator. The more informed the mediator is about the positions of the parties, the more effective he or she will be in the process of bringing a settlement.

You must avoid the tendency to try to "game" the mediator. Good mediators will see through trickery or efforts to mislead them, and such efforts will hurt your credibility and slow down the process. Be "up front" with the mediator at all times. At the conclusion of any private session, make sure to inform the mediator of any information that you disclosed to him or her that you feel should be held confidential. After he or she leaves the caucus with you, he or she will then be visiting the other party, and this "shuttle diplomacy" will likely proceed for quite some time. Making sure that the mediator knows what information is confidential will protect you both from future misunderstandings.

Finishing Up

If an agreement is reached during the mediation, do not leave until the agreement is memorialized in writing, with the major points clearly summarized. In addition, the parties should understand who will have responsibility for drafting the final agreements and the timetable for final settlement. It is crucial to indicate in this agreement that it contains the "essential elements of the settlement," so if a subsequent dispute arises about whether a settlement was indeed reached, this handwritten document will hold up in court. I also strongly recommend that an arbitration clause be placed in the settlement document. This should state that "[i]n the event there is any dispute over this settlement or the settlement documents, that dispute will be submitted to the mediator for binding arbitration. The arbitrator may assess fees and costs." The existence of this paragraph usually speeds up settlements, discourages game playing, and keeps the parties on track. Another thing to consider while drafting the agreement document is confidentiality.

While all court rules provide for confidentiality of settlement discussions, it is important that the mediation "contract" also contain such a clause. Further, if people who are not parties to the case attend a mediation, they should also be made to sign confidentiality agreements.

After you have successfully completed the mediation process a time or two, it is likely that you will agree that mediation is the most effective means for parties to manage the risk of litigation. Law books are filled with cases where one party lost and the other party won. Neither went to trial expecting to lose, and so one party always walks away unfulfilled. Mediation assists the parties in evaluating the strengths and weaknesses of their positions. It also gives attorneys and clients the chance to hear from a neutral observer about his or her assessment of the case. By applying this knowledge to any given case, parties have a greater chance of reaching a settlement from which both sides can gain. ■

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