Winning at Mediation

Basic Commercial Litigation Seminar
Sponsored by the Young Lawyers Division
of the Florida Bar
November 13, 2009
Tampa

Robert M. Daisley
Certified Federal and Circuit Mediator
4006 S. MacDill Ave.
Tampa, FL 33611
(813) 835-7722
rob@daisleymediation.com
www.daisleymediation.com

I. Preparation for Mediation

A. The importance of thorough preparation

1) Why prepare for Mediation?

2) According to statistics from Florida Office of State Courts Administrator, for calendar year 2007, less than 1% of all Circuit Civil cases were resolved through trial - 0.54% were disposed of through jury trials (1,028 out of 187,680) and 0.43% were disposed of through non-jury trials (815 out of 187,680)

3) More cases get resolved through Mediation than through trial

4) Most lawyers spend far more time preparing for trial than for Mediation (and most lawyers go to more seminars on trial than on negotiation and Mediation)

5) Preparing for trial helps the lawyer prepare for Mediation

6) But there are key differences between trial and Mediation

7) Mediation is informal, so extemporaneous speaking is encouraged
   a) extemporaneous means using a spontaneous, conversational manner that highlights natural interaction with the audience
   b) extemporaneous does not mean impromptu, off-the-cuff or "winging it"

B. Establishing goals for the Mediation

1) Learn or confirm what issues are in dispute and identify the issue or issues on which the parties are in fundamental agreement

2) Confirm or learn opposing party's or parties' position on the issues

3) Learn or confirm the settlement position of other party or parties

4) Identify the best possible outcome through a Mediated (mutually agreeable) settlement agreement (find out the "best offer" of the other party or parties)

5) Identify best and worst alternatives to a negotiated agreement

6) Define, with the Mediator's assistance, and confirm with the client, a "win," a "loss" and a "tie" if the case proceeds to trial

7) Identify, with the neutral's assistance, your best and weakest arguments and your opponent's best arguments (put your advocacy role on hold for a moment and ask the Mediator what he or she thinks is the other side's best argument)

8) With the Mediator's assistance, manage client expectations – **note: a client with unrealistic expectations is destined to be an unsatisfied client** – if a client does not have realistic expectations, the Mediator is prepared to be the bearer of the "bad news"

9) Revisit (based on what you learn during the Mediation) and confirm with the client the litigation budget (ASK THE MEDIATOR TO ASSIST WITH THIS CRITICAL CONVERSTION)

10) Assist the client in making an informed decision on an actual as opposed to hypothetical offer (there is a big difference between the theoretical acceptance or rejection of a given offer and the actual acceptance or rejection of that very same offer

11) Keep an open mind – and remind your client to do the same – until the time comes for the client, with your advice and counsel, to make the tough decisions

12) Consider this potential ultimate goal: **a client who is thoroughly satisfied with your representation** – if this is indeed your ultimate goal, plan on how to use Mediation to get there

C. Mediation Case Summaries – what to leave in, what to leave out

1) Generally, include whatever information you think will help the Mediator to become familiar with the facts, issues and settlement positions of the parties.

2) Generally, a Mediation Case Summary should include these sections:
a) a brief case overview or "statement of the case" similar to what you might submit in a non-jury trial or executive summary;
b) a summary of the background facts, disputed and undisputed;
c) a summary of the issues, disputed and undisputed;
d) a summary of the case status, including any pending or expected motions;
d) your understanding of the positions of the adverse party or parties on liability, damages and settlement;
e) your party's position on liability, damages and settlement;
f) the history of any previous settlement negotiations; and
g) the name and position of the party representative(s) who will be attending the Mediation for your side.

3) Charts or excel spreadsheets, especially on complex damages issues, are particularly helpful to the Mediator

4) Consider sharing your Mediation Case Summary with the other side at or before Mediation - ask yourself: why not?

5) You can send confidential information to the Mediator under separate cover (fax, letter or email) and distribute the Mediation Case Summary that omits the confidential information directly to the decision maker on the other side

6) If you want to make sure that the parties and not just counsel receive your materials, you can provide opposing parties and their counsel with copies of your Mediation Case Summary at the Mediation conference (it is recommended that you wait until after you finish you opening remarks unless you want people following along)

7) Copies of the most recent pleadings and court orders or pending motions are helpful, but unless the procedural history affects the substantive issues, do not bother sending pleadings that have been superseded

8) Detailed information regarding discovery disputes that have been resolved is not particularly helpful, as opposed to a brief description of the litigation history, including the current case status

9) You may also call the Mediator and provide a verbal Mediation Case Summary or supplement to your written materials – for example, if you want to clue the Mediator in on the inter-personal dynamics

D. Preparing clients to help, not hurt, their cause

1) Mediators and opposing parties and counsel pay close attention to what kind of impression your client makes at Mediation

2) Prepare a client for Mediation just as you would prepare a client for trial – cover what they should say, not say, dress, and act, carry themselves, etc.

3) If a client makes a good impression, succinct, extemporaneous (but prepared) remarks in joint session can greatly help his or her cause

4) Unexpected emotional outbursts in joint session usually do more harm than good

5) Typically, clients participate more actively during private caucus sessions

6) Review with the client the demeanor that you would like the client to display during private caucus as well as joint session

7) Generally, a client who displays quiet confidence will make a more positive impression than one who bangs on the table

8) Clients should be reminded (more than once) to keep an open mind

II. Presentation at Mediation

A. The key differences between Mediation and trial

1) Decision makers are not the judge and the jury but the parties

2) Only mutually agreed upon decisions count (unilateral decisions do not matter) – as I say in my Mediator's opening statement, "that is why I have this great job"

3) Rules of court (not only evidence but also procedure) do not apply
   a) audio-visual aids are limited only by your imagination
   b) "golden rule" arguments allowed
   c) "vouching" allowed
   d) you may talk about other cases

4) Opening joint session in Mediation may be the only opportunity you ever get to speak directly to and have a discussion with the party on the other side

5) Opening joint session in Mediation may be the only opportunity you ever get to give handouts to the party on the other side
   a) Mediation Case Summary – your position on liability and damages
   b) damages calculations – especially Excel spreadsheets
   c) verdict form (not always obvious in commercial cases) which you can then fill out in your favor to demonstrate specifically how it is that your side wins at trial
   d) the "box score" from HCBA "Lawyer" magazine
   e) particularly relevant cases – especially recent authority
   f) opinions from the Judge in your case in other cases – eg., actual fee awards where hourly rate of $x or multiplier of y was awarded
   g) Jury Verdict Reporter results from other cases

6) Mediation may be your only opportunity to work with, as opposed to against, the party on the other side

7) These opportunities are often missed – example, plaintiff's counsel who is worried that defense counsel's reports are "filtered" but then does not submit a Mediation Case Summary that in essence is a case analysis report with all the information that the plaintiff thinks is important to value the case

8) "Opening Statement" at Mediation ≠ Opening Statement at trial

B. Reaching all members of your target audience

1) Who decides at Mediation? Opposing party, counsel or both?

2) Generally, to reach a mutually agreed upon resolution, you have to "sell" the other side **and** opposing counsel

3) And the Mediator (it is more natural, and thus far easier for the Mediator to "sell" what he or she believes in)

4) Note the different perspectives and motivations of each
   a) opposing party is motivated largely by interest in the proposed outcome
   b) opposing counsel may have multiple goals – and a satisfied client should be a very high priority if not the number one goal
   c) as a practical matter, Mediator's number one interest is in getting a deal done

5) Do not assume the party that is quiet in joint session is a wallflower in caucus

C. PowerPoint and other audio-visual aids – what works and what cures insomnia

1) Target PowerPoint to specific goals

2) Implicit goal: demonstrate that you are prepared to try the case

3) Refer to materials that you are not inclined to share with other side until they show that they are serious (e.g., quote from an expert whose report is not yet due – particularly effective if the other side has not yet retained an expert)

4) Quote admissions from depositions (especially if decision maker may not have read the depositions but rather summaries)

5) Chart and spreadsheets on damages – spend some time explaining method for calculating damages – do not forget the details on interest, costs and attorney's fees calculations

6) Leave opposing party with this question: "Can that really happen if we go to trial?"

7) Keep it moving – skip slides to speed up the pace, and then slow down on what is captivating attention

8) Use slides to answer questions – showing that you have anticipated questions (and will anticipate what will happen at trial)

D. Communicating directly with decision-makers for the opposing side

1) Match your direct communications to the decision makers on the other side to your goals for the Mediation – this is the most important part of Mediation preparation

2) Convey your interests to let other side know "where you are coming from"

3) Convey your positions on the issues separately – and in doing so, keep it simple

4) Also cover your understanding of the other party's interests and positions so that you can learn whether you have misunderstood other party

5) Include the math – charts or excel spreadsheets on damages, especially those which should be beyond dispute (e.g., the statutory prejudgment interest rate is X) and those on which you think the other side will agree (e.g., "the elements of damages are as follows:")

6) Explain the consequences of impasse through a matter of fact (non-threatening) explanation of what happens if the dispute continues without a Mediated settlement
   a) this is easier said than done
   b) focus on the process of how future events will unfold
   c) e.g., from defendant's point of view: "we will have a hearing on our motion for summary judgment and the Court will then rule that the case should be thrown out of court or that the case should proceed to trial"
   d) e.g., from plaintiff's point of view: "we will ask the jury to return a verdict for a total of at least X" and after deliberation, we all will hear a knock on the door and find out what the jury decides
   e) as a general rule, "quiet confidence" goes a lot farther than banging on the table

7) Use this opportunity to eliminate doubt that opposing counsel is not accurately conveying to his or her client your interests and positions

8) Attempt to obtain an acknowledgement on what are the possible outcomes if the case proceeds beyond the Mediation; in other words, the various ways in which people not participating in the Mediation (judge and jury) might decide the dispute if the parties fail to resolve it

9) Mediator can then reinforce these points to make sure that the parties understand each other's interests and positions as well as the best and worst alternatives to a negotiated agreement

10) Your direct communication to the other side is the building block for "reality checks" that may be necessary

III. Negotiation

A. Planning several moves ahead

1) Disputes rarely settle on the first offer, no matter how "reasonable"

2) "Take it or leave it" proposals are discouraged – they encourage impasse

3) Myth: disputes always settle at the mid-point

4) Reality: most sophisticated bargainers calculate the mid-point

5) Need to assess negotiating styles – from "plodders" to "bottom line" types

6) "The bracket" – if other party will offer X, then we will offer Y
   a) used to expedite rounds of negotiations through larger "moves"
   b) also used to coordinate negotiation styles
   c) more effective if used in the "middle" of the negotiation

7) 80/20 rule of Mediation – 80% of the movement takes place during the last 20% of the Mediation (but no one tells you when that final 20% begins)

8) "Splitting the difference" - when parties are close, mid-point is usually proposed to close the gap (keep track of those mid-points)

9) Defense tactic: "pockets are empty" versus "best and final offer"

10) Plaintiff tactic: "run out of concessions" versus "take it or leave it"

B. Getting to "win-win" resolutions

1) "Getting to Yes" basics (from famous Fisher and Ury book):
   a) separate the people from the problem
   b) focus on interests not positions
   c) invent options for mutual gain
   d) insist on using objective criteria

2) recognizing a "win" – especially for each decision-maker – not in terms of winning or losing the case but in terms of what the ultimate result means to the decision maker - examples:
    a) settlement within policy limits is a win for the insured (especially if facing non-covered exposures)
    b) settlement below a reserve is a win for a claims rep (especially if facing prior demand exceeding policy limits)
    c) plaintiff for whom less money now is better than more money later
    d) cases that "have to settle" because the desired result is not on the menu at the courthouse

3) standard Mediator questions:
    a) What is the upside to settling?
    b) What is the upside to going to court?
    c) What is the downside to settling?
    d) What is the downside to going to court?
    e) What is the best alternative to a negotiated agreement (BATNA)?
    f) What is the worst alternative to a negotiated agreement (WATNA)?

4) Prepare your BATNA and WATNA in advance – know your next few moves if the case does not settle

5) Questions that ought to be but are rarely asked:
    a) What are you going to do with the money?
    b) Where is the settlement money coming from?
    c) Define a "win" "loss" and "tie" at the courthouse?
    d) If you come back from Court with the same result that was just proposed by the opposing party, how will you, your client, your colleagues, your client's colleagues view that result? How far off from a "win"? How far off from a "loss"?

6) Solutions that the court cannot provide – if the terms are important, then settlement becomes a priority - examples:
    a) intellectual property cases – buying a license for house plans
    b) employment cases – promotion
    c) eminent domain – "non-monetary benefits" – e.g., access
    d) commercial cases – everything from payment plans to joint ventures
    e) personal injury cases – structured settlements

7) When going to court is not an option
    a) when a confidentiality clause is necessary
    b) when settlement will bury mistakes

C. Responding to traps and ploys – swimming with the sharks (see John Patrick Dolan, "Negotiate Like the Pros")

1) Basic response to negotiation gamesmanship - let the dirty trickster know that you are on to him or her:

   a) good cop/bad cop – "do you two need some time to work out your differences?"
   b) the loudmouth – "methinks the gentleman/lady doth protest too much"
   c) the bully – "if I wanted to get interrupted this much I would have gone on O'Reilly"
   d) the idle threat maker – "if you keep making threats, it is going to be difficult for me to focus on anything that you are interested in; shall we get back to the merits?"
   e) actions speak louder than words, do not forget non-verbal communication (remain silent and look bored)

2) the "wince" (dramatic negative reaction to an offer – e.g., "HOW MUCH!!!! YOU'RE KIDDING, RIGHT?")– repeat the offer, with brief explanation of your calculation and to how it could have been more (or less) than offered

3) the "oh by the way" (adding a previously unmentioned term, also known as a nibble, e.g., "oh by the way, plus fees and costs") – repeat the offer ("no, our offer is inclusive of fees and costs"), bargain for something else in exchange or change the offer to reflect the new term ("well, if fees and costs are extra, then our offer is Y")

4) the "red herring" (issue trumpeted as paramount but really has nothing to do with the case) – set aside the issue and come back to it later

5) the "slipping it into the documentation" – actively participate in the drafting of the documentation and if possible, come prepared with standard neutral language

6) "limited authority" or "cannot justify this" to my boss, the Board, the Department, etc. – question the lack of authority, call the "home office" or write the justification report, and wait for home office's response (and continue negotiations at another session or via telephone)

D. Closing the deal – why both Spock and Kirk must be on board

1) Do people make important decisions on the basis of:

a) Logic  ;

b) Emotion  ; or

c) both? 

2) To the decision makers, is whether to settle or not an important decision?

3) Basic sales techniques:
   a) establish value before you get to price – do this in opening statement to the extent possible
   b) ABC – always be closing – if you are prepared, it is possible to set up your last settlement offer in your opening statement
   c) AIDA – attention, interest, decision, action
   d) help "customer" visualize by giving "customer" something tangible that he or she can touch and see – e.g., Richard Branson writing and then giving "The Rebel Billionaire" winner a check for $1 million before asking him if he wants to give it back for an unknown prize
   e) if party does not accept the offer, then take the token back (known as a "takeaway")

4) Putting this into practice at Mediation:

a) find out not only what the other side wants, but why (e.g., is it just as much money as possible, or enough $ to buy a house, take early retirement, etc.)
b) identify what it means for the decision maker to settle the case (e.g., will the corporate rep be able to tell his or her boss that he or she did a good job?
c) do not forget goals and emotions of opposing counsel, what is in it for them?

d) first explain offer in terms of "features and benefits" (offering X to settle, payable in two weeks, mutual releases required")
e) next explain practical implications of features and benefits, e.g., get money now instead of two years from now, settle for sum certain rather than risk exposure to higher verdict, no trial, no appeal, no expert fees, no additional attorney's fees
f) next explain not only the offer, but what does it mean - emotionally as well as financially) to the decision maker – in both the short-term and long-term if possible
g) depending on the decision-maker, you may want to emphasize the emotional significance of offer (e.g., "you can buy that house you always wanted" "you can retire with the severance package offered" or "you can close this pain in the you know what file")
h) "parting gifts" – offers of judgment (bring form with amount to be filled in at Mediation) or motions (summary judgment, leave to amend to bring claim for punitive damages, etc.) – these both make a statement and ensure that the party on the other side, not just opposing counsel, receives accurate information regarding the consequences of not settling
i) if possible, bring a check
j) be prepared to close the deal at Mediation – if you need special release language, bring it with you (in digital format)

5) *"Because only one thing counts in this life! Get them to sign on the line which is dotted!"*