Mediation: A Roadmap to Success for Counsel and Client

By Jeffrey Grubman, Esq.

Mediation presents multiple opportunities for litigants. First, it is an opportunity to tell their story to an active and empathetic listener. Because very few cases ever get to trial, mediation is arguably the best and often the only opportunity to accomplish this important cathartic goal. Second, it is an opportunity to consider the case from the opponent's perspective. The mediator's neutral role puts him or her in the best position to effect this important result. Third, it is an opportunity to learn facts or nuances about the case that were not available prior to mediation. Fourth, it is an opportunity to settle the case on terms that the party may better understand and accept as a result of having participated in the mediation process.

There are many actions that attorneys should undertake prior to and during mediation to make all facets of the mediation process as meaningful and positive as possible and to achieve the best settlements for their clients. This article will explore and discuss techniques to accomplish these goals by focusing on the following topics: 1) How to prepare clients for mediation, 2) How to prepare the mediator in advance of mediation, 3) Opening statements in mediation, 4) Interacting with clients during mediation, and 5) Interacting with the mediator during caucus.

Preparing Clients For Mediation

Counsel should always meet with their client in advance of the mediation. Furthermore, prior to that meeting, counsel ideally should prepare a detailed memorandum analyzing the strengths and weaknesses of the case. The memorandum also should address liability and damages; discuss the varying potential results; the approximate likelihood of each; and the costs going forward. Clients require time to integrate the salient points before intelligently discussing a settlement range with their counsel.

When meeting with clients before mediation, counsel should explain the mediation process clearly, including some background about the mediator, the mediator's role, how the mediation will begin, how the caucuses work, etc. This is particularly important for parties who have never participated in mediation. Counsel should try to agree on a realistic potential settlement range with the client at that meeting. However, it is important for counsel to tell his or her client to keep an open mind throughout the mediation because something could occur that will trigger counsel to recommend a different settlement range.

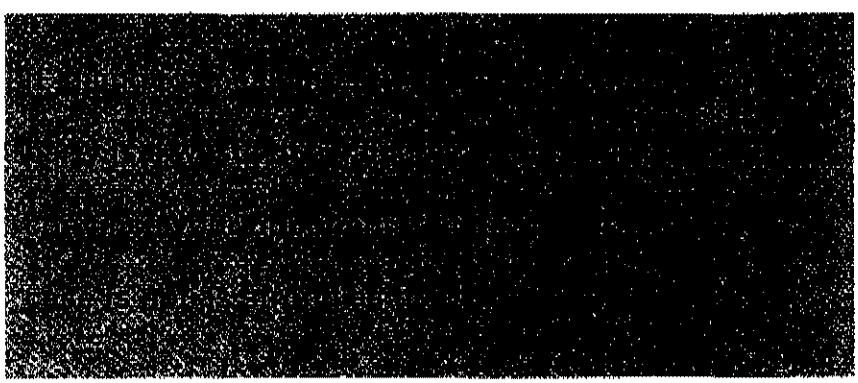
Finally, counsel should tell his or her client not to express opinions regarding the acceptability of settlement values in the presence of the mediator. The mediator is constantly watching the client to determine where the client ultimately intends to finish negotiating. While counsel should never mislead the mediator, there is no reason for a party to let the mediator know their settlement goal before the end of the process.

Preparing The Mediator Prior To Mediation

Based upon the written materials submitted to the mediator, a bright, experienced mediator is likely to form opinions about the relative strengths and weaknesses of the case before the mediation begins. Accordingly, it is important for counsel to provide the mediator with the pleadings and any important documents in advance of mediation. It is also helpful for the mediator to receive a mediation statement summarizing the evidence and the law.

I read everything that counsel provides to me before mediation. I take the process extremely seriously and like to be well prepared before the mediation session begins. In fact, if I have not received written materials, I have my assistant contact counsel a couple of days before the mediation to obtain them.

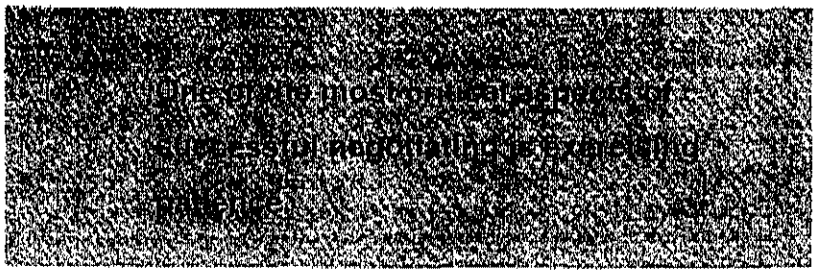
Most cases only have a handful of key documents. If those documents help the client's case, counsel should provide them to the mediator before the mediation. If those documents hurt the client's case, but there is a reasonable explanation that will diffuse the significance of the evidence, counsel should explain this to the mediator in her mediation statement. It is important to keep in mind that mediation begins before the formal mediation session, and counsel should represent their clients as effectively as they can throughout the entire process.



Opening Statements in Mediation

Counsel must accomplish inherently inconsistent objectives in their opening statement in mediation. On the one hand, the purpose of mediation is to settle the case. Therefore, counsel wants to proceed in a conciliatory manner consistent

with the spirit of making a deal. On the other hand, the parties are involved in a hotly contested adversarial proceeding and counsel thus wants to articulate his or her client's position powerfully in a way that demonstrates that both counsel and the client believe strongly in their case.



Many attorneys do not know how to walk the fine line between being conciliatory and advocating his or her client's position. The most glaring mistake I regularly see attorneys make in opening statements is speaking to the mediator instead of speaking to the opposing party. Regardless of whether counsel speaks directly to the mediator, he or she will hear you. However, failing to speak directly to the opposing party is a waste of a valuable opportunity to convince your opponent that its case is not as strong as he or she thinks.

While making the opening statement, counsel also should act as if he or she and the opposing party are the only people in the room. Counsel should first state something to the effect that the client is disappointed that the parties have reached this stage and is hopeful that the case can be resolved. The facts of the case will determine how conciliatory these remarks should be. After making these conciliatory opening remarks, counsel should then state that he or she hopes the opposing party understands that he or she has a client to represent and that they have a different view of the case. Accordingly, it is their job to explain their client's position, while simultaneously not offending the opposing party. In my experience, these types of conciliatory opening remarks are very helpful to the mediator in moving the case towards settlement.

Interacting With Clients During Mediation

The word "counselor" is a particularly appropriate description for the role of the attorney in a mediation caucus. For most parties, mediation is a foreign, emotional experience. The parties rarely understand that their adversary will usually start the negotiations at a number far away from where they will eventually agree to settle the case. It is important to the ultimate success of the mediation for the parties not to react too negatively to the initial settlement demand/offer. If an attorney expresses frustration vocally regarding the initial settlement offer/demand, this may cause the client to become more entrenched.[1] Such an emotional reaction by counsel is not good "counseling."

This is true at every stage of the negotiating portion of the mediation. Counsel should never let their opposing counsel's negotiating style prevent them from acting in their client's best interest. Accordingly, counsel should remain unemotional throughout the process. One of the most critical aspects of successful negotiating is exercising patience. Sometimes, this requires taking a break for a few minutes. Sometimes, this requires trying a different approach, such as switching to a bracket.[2] Sometimes, this even requires terminating the mediation but leaving the process open. A good mediator will help with different approaches when the process appears to be bogging down.

Every mediation is different, and each requires counsel to remain flexible and keep an open mind. Strategy decisions should be made logically and dispassionately, independent of counsel's frustration with the opponent's (or the client's) negotiating style or tactics. In fact, it sometimes is necessary to take an action that will help opposing counsel save face. Counsel should have no problem doing this if it assists in reaching a favorable settlement for their client.

Interacting With The Mediator During Caucus

The majority of mediations take place in caucus, which often occurs over the course of many hours. It is a fluid process involving ups and downs. Therefore, counsel should listen and watch the mediator carefully at all times. If counsel can convince an effective mediator that his or her client's case is strong, the mediator will likely help the client achieve a good result. Therefore, it is important to focus on what is interesting to the mediator and respond in the most favorable way for the client. If counsel believes that the mediator is evaluating the case worse for his or her client than counsel has, counsel should address this issue with the mediator (perhaps away from the client) before the mediator solidifies his or her evaluation. Conversely, if counsel believes that the mediator is evaluating the case better for his or her client than counsel has, counsel may choose to take a less active approach than counsel otherwise would.

Counsel also should understand that the mediator is constantly trying to read the parties and the attorneys. The mediator is watching counsel's verbal and non-verbal communication as well as that of the client with an eye towards getting the case resolved. Therefore, while the client should answer the mediator's factual questions honestly and openly (understanding that those discussions are privileged), the client should not react to the opponent's settlement demands or suggest what amounts would be acceptable. Those discussions should take place between the client and his counsel away from the mediator.

Moreover, counsel should be honest with the mediator regarding the strengths and weaknesses of the client's case during caucus. However, this does not mean that counsel

has to overstate the importance of the weaknesses of the client's case. To the contrary, counsel should attempt to diffuse such weaknesses as much as possible. However, if counsel tries to convince an experienced mediator that a weakness is not really a weakness, counsel will likely lose credibility in the mediator's eyes. This ultimately will not benefit the client.

In addition, mediation is not like a hearing in court when counsel wants to make all of his arguments at once. Because mediation evolves over hours, it is fairly common for the negotiations to bog down at some point during the course of mediation. The best way to help the mediator at that time is to give him or her a new fact or piece of evidence. Accordingly, I am of the belief that counsel should not divulge all of his or her client's good facts or documents during the initial caucus.

Finally, whether and when to disclose settlement authority to the mediator is an interesting question. Some of the attorneys I work with will never tell me their settlement authority, even after the case settles. Other attorneys I work with will tell me their settlement authority early on in the process. I do not particularly like to know the parties' settlement authority early on in the process. I like to be evaluative, and knowing one or the other side's settlement authority could conceivably color my evaluation. Nevertheless, some attorneys want me to know their settlement authority early on, and I cannot point to any specific examples where knowing the authority resulted in a less favorable settlement for that attorney's client.

Conclusion

Counsel should be thinking about a proper settlement of his or her client's case from the moment he or she is retained and at regular intervals thereafter. Mediation is a wonderful tool to help counsel obtain a fair and reasonable settlement for the client. The ideas set forth in this article should help the practitioner obtain favorable results for their clients in mediation.

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[1] However, counsel may want to give such a reaction to compel the mediator to respond in a certain way. This is fine as long as counsel has told his or her client in advance that he or she will do this and not to take it seriously.

[2] A bracket is a conditional move. For example, if the claimant's last settlement demand was $500,000 and the respondent's last offer was $50,000, one of the parties could suggest that if the claimant decreased his demand to $300,000 the respondent would increase its offer to $100,000. By doing this, the parties are "bracketing" their numbers closer together and breaking a roadblock.

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