Want to have More Successful Mediations?

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May, 2010

If you answered yes to that question, I can tell you that from my mediator's perspective, it's a matter of maintaining balance in your role and managing the expectations of all parties.

Balance: What do I mean? I see many a litigator coming to mediation with only her advocate's hat on. That will not get a successful result. The lawyer needs to be able to transition in role from advocate to deal maker and to prepare the client ahead of time for this transition as well. As mediation has become commonplace, litigators think they know all about it. As a result, they have been trying to make the mediation process an adjunct of litigation without realizing that it is a different process. They fail to use mediation to its full potential and can instead impede settlement. About 98% of civil cases settle, many as a result of the mediation process. Realistically then, mediation will probably be your client's "day in court." It will be there that your client can be heard and your client needs to be prepared to take advantage of that opportunity.

But is your client getting to talk, and who is the audience? In this short article, I want to focus on two points to help structure your next mediation and most likely enhance its result.

Mediation preparation:

I would like lawyers to be much more thoughtful about (1) the documents they put in the hands of the mediator to review before mediation and (2) how they prepare themselves and their clients for the session. I expect to do research on my own before the mediation. I will visit the clients' websites, for example, to learn more about their businesses. It is also my practice to hold a pre-mediation conference call with the lawyers well in advance of the session. I use that call to probe many aspects of the case and their clients' attitudes toward it (my conference checklist is under the Engagement Documents tab of my website, www.dispute-solutions.com, and attached to this article). I answer their questions about my mediation techniques and expectations. I always ask them to supply me with the important documents and I set aside time to review whatever they send me.

During the pre-mediation conference with counsel, I frequently find that no information exchange has occurred. My first step then is to help the lawyers manage that exchange so that adequate information has been shared in advance of the mediation to help the parties prepare. Usually that includes an exchange of core documents and sometimes, they even agree to a single deposition.

Most importantly, in the pre-mediation conference, I ask counsel to prepare a short mediation statement, which I ask them to exchange. I suggest that they send me any confidential information in a side letter. I frequently solicit a demand from plaintiff's counsel as part of the

mediation statement so that the defense is not surprised with it at the outset of the mediation session.

Frequently the mediation statements I receive are disappointing. Perhaps the lawyers don't want to do the extra work, or they delegate the job to someone too inexperienced. Frequently, the statement is just a condensed litany of the allegations in the pleadings. Sometimes, the lawyers dump on me the documents they have already prepared for a court filing--usually a motion for summary judgment. Sometimes I get two banker's boxes--an MSJ from each side--before the session.

When the lawyers present their motion papers, opposition and the rest, it's because they want the mediator to be a shadow judge to hear their MSJ. In fact, if the parties want an evaluation of their case, they will usually decide on a retired judge as the mediator. I do not see evaluation as my role. I facilitate the parties' settlement discussions, and only reluctantly if other tactics fail will I state my view.

For those seeking an evaluation in mediation, I wonder if they have considered how they will proceed, once the mediator has given an evaluation, if the two sides do not accept it? What other tools of persuasion does that mediator have to use with the parties? I do not see the mediation as another part of the litigation contest in which the mediator is to tell the clients what the value of the case is. Instead, I hope that the lawyers will write their mediation statements with an eye toward how they will be received by the other side.

The lawyers should remember the true audience for the mediation statements. I begin that by refocusing them during our pre-mediation conference call on the parties' role in the mediation. I want each party to see the other side's statement, not only of its position, but also its willingness to negotiate. My role is to coach the parties so that each side puts its best foot forward. That is best done at the mediation in a joint session after the parties have read each other's mediation statements.

Preparation and the joint session

Increasingly, litigators say they don't want a joint session. In the pre-mediation conference, I hear them assert--"we already know each other's position", or," it's a waste of time since the lawyers just make speeches". I don't like to acquiesce in avoiding the joint session, but I can see why lawyers are leery of it. In my opinion, that is primarily because litigators have misused the joint session and we mediators have let them. Rather than preparing their clients to talk, and using the opportunity to hear the other side's position from the client, the advocate shuts down the client, does all the talking, and scurries into caucus as quickly as possible.

Perhaps by eliminating the joint session, the lawyer is trying to conceal a lack of adequate preparation. I do think that fear is motivating most of this reluctance. Yet, the value of a joint session for all participants is significant in most cases. It is not meant to be a contest at which lawyers make oral arguments as if to the court or to a jury. It is an opportunity to speak, then to listen to the other side speak.

That does not mean the litigator should not present her client's case in the best light in the joint session. The presentation should be thorough and professional, focusing on the strong points of your client's case. If the case warrants video or Power Point presentations, by all means, make

them. But tell your client to come prepared to speak and thereafter to listen as well. (A sample client preparation checklist is available on my website, www.dispute-solutions.com, under the Engagement Documents tab and attached to this article.)

Of overriding importance, however, is the tone you use in joint session. While your opening statement is somewhat like one for a bench trial, it is not one. At the end of the statement, it should be apparent to the opposition that although you and your client are convinced of the strength of your case, you have come prepared to settle it. Besides, the strength of your case is only one factor in the mediation. It is a point of leverage, but only one point. Many other aspects of the conflict, including the parties' emotions (yes, emotions are in every case), will play out in the course of the mediation.

The mediator also gets a good deal out of the joint session. Ideally, in joint session, I get to see the interaction of the parties and their lawyers and I get to see how well prepared each side is. Even if the lawyers will agree to it only if they do not make any presentations at all, I suggest now on a "lite" joint session in which I do the talking. I can set the tone for the day and I get to demonstrate that I am prepared and ready to guide the process. I may even get some "buy in" from the participants to work together to achieve settlement.

One way the lawyers can help their clients to be adequately prepared is to put their deal maker hats on. I frequently begin the mediation by telling the parties that this is "let's make a deal." If this is first time they have heard that concept, then it will take awhile to sink in. If on the other hand, the lawyer has started early to manage her client's expectations, the chances of success in mediation as enhanced.

Also, if I am the first person to point out to the client the weaknesses in the client's case, it will be a long day indeed. I know that many litigators think that it is the mediator's job to tell the clients they have a weak case. But it can't be only the mediator's job--the lawyer needs not to oversell the client's case from the beginning of the representation. If you do oversell it, then it's more difficult to get the client down to earth during the mediation and sometimes it never happens.

And you must be adequately prepared for the tools that the mediator is likely to use during the mediation; if you are not, it shows. Mediators use several devices in caucus to manage expectations--one is the decision tree. In caucus, I work with the lawyer and client to accurately predict the expenses the party is likely to incur in the future in the case. The parties provide the data that the mediator uses to demonstrate the risks and rewards of settling or continuing to litigate.

If the mediator is inclined to use these charts, It helps if the litigator is prepared to discuss the techniques. (For a good discussion on risk analysis, decision trees, and several sample settlement analysis charts, see www.settlementperspectives.com.) Whether you employ a decision tree or some other more informal device, a chart that you can fill in with the client demonstrating the results of various decisions helps the client visualize outcomes concretely.

Mediators like to use decision trees and similar tools because they have a tendency to pull the parties into a more realistic bargaining range. Another device I use if the parties remain far apart even after many hours of discussion is the mediator's proposal: I convey the same

settlement number and terms to all sides and set a deadline for a confidential "yes" or "no" response. I usually give the parties at least 24 or even 36 or 72 hours to consider my mediator's proposal and I make it double blind, so that neither side knows if the other has accepted unless it has accepted. I have found that the mediator's proposal is frequently successful if the parties take the time after emotions have cooled to seriously consider the risk of continuing versus the certainty of settlement at the suggested amount. On the other hand, it makes me squirm somewhat, since I can't escape the fact that I have picked the number rather than letting the parties get to it themselves. And since it is a very evaluative step, if it is not successful it may reduce the mediator's utility as the parties may conclude that the mediator is no longer neutral.

I remember being taught as a litigator many years ago "if more than 10% of what happens in a trial comes as a surprise to you, you are not adequately prepared." The same holds true for mediation. Employing the preparation suggested here, and maintaining balance in your role, will cause your mediations more frequently to result in settlements and satisfied clients.