

MEDIATION MASTER CLASS

KBA LAW PRACTICE TODAY

EXPO

APRIL 3, 2009

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I. PREPARING FOR LITIGATION

A. The Client.

If you represent a client who is not familiar with mediation, it is important that you meet with that person several days in advance of the mediation. If you represent a corporation and the representative will be an insurance adjuster or perhaps in-house counsel for the corporation, then you can probably prepare for the mediation over the telephone.

With regard to the client who is inexperienced with mediation, it is important that you meet and explain the difference between mediation and litigation. The client needs

to know that mediation is a very safe environment where no outcome is going to be forced upon them. They need to know that they do not have to say anything at a mediation but that their participation is welcomed.

When you meet with the inexperienced client, it is important to explore their real interests and to obtain the client's input on various resolutions that might satisfy those interests.

It is also important that you explain to the inexperienced client that your role as a mediation advocate is different from your role as a trial advocate. Explain that in the mediation process, it is important that the client understand that mediation is the only opportunity that the client will have to speak directly or indirectly through the mediator with the other side. In litigation, of course, all communication is directed toward the judge and jury. You should counsel your client to approach the mediation session with the attitude that it is a joint problem solving session and not a trial.

You should prepare the inexperienced clients for the reality that during mediation they are going to hear things that they do not agree with. Explain to them the importance of listening carefully even though they might not agree. It is advisable to be very open and frank with the client before mediation whether that client is a sophisticated client in the field of mediation or a beginner. If your client hears something in the mediation from the other side for the first time that is detrimental to your case, it may undercut your credibility with the client.

You should stress that mediation is a voluntary, non-binding process that has the benefits of open communication, opportunity to be heard, informal discovery, issue

identification, potential for complete or partial settlement with solutions not available from the court, and probably most importantly, control over the outcome.

The inexperienced client should be advised that he or she should dress as if going to court.

The inexperienced client should be cautioned about having casual conversations with anyone but you during the mediation.

There are good videos about the mediation process which you can show the client when you meet before mediation.

B. The Advocate

The key to representing your client effectively in mediation is “prepare, prepare, prepare”. It is certainly inadvisable to go into a mediation without having done your homework and expect the mediator to perform some type of miracle. In a letter, you should have provided the mediator with a candid appraisal of the strengths and weaknesses of your case and possible methods of resolving the case. Your pre-mediation submission to the mediator should contain a confidential, frank and open analysis about the strengths and weaknesses of your case. There certainly is nothing wrong with trying to convince the mediator of the justness of your cause. Just as judges are, mediators are human beings who will likely go into the mediation with some inclination about how the matter should be resolved. If you give the mediator a strong, convincing pre-submission letter your mediation will go better because the mediator will be taking your strong position into the caucus room with the other side.

To be effective in mediation, you must time the mediation appropriately. The case must be developed prior to the mediation to the degree that the other side is convinced that you can put on a strong, effective case if it is to be tried. If the other side is convinced that you may win a summary judgment motion and that you have a strong case to present to the Judge or jury, your chances of a settlement are increased to a great degree. However, if you appear at the mediation unorganized and have not developed a case to an extent that the other side believes you can effectively take the case to trial, this will undercut your ability to arrive at a satisfactory settlement.

Going into mediation, you need to be aware of the personal details of the clients' lives and their interests. Their emotional and financial needs should also be explored. This will help you thoroughly and competently present your client's side of the story during the mediation.

Another reason for being prepared for mediation is that you will be scrutinized during the joint session. Your effectiveness and command of the facts and the law in your opening statement may go a long way towards moving the other side toward a reasonable settlement.

Here are a few things that you should consider when preparing for mediation:

- If there is a subrogation issue and you represent the Plaintiff, make arrangements to deal with that at the mediation.
- In a personal injury case you should come to the mediation with a total of the medical expenses with attached bills.

- You should have documentation of lost wages if you represent the Plaintiff and lost wages are an element of damages.
- Reports of experts should be made available to the other side, if possible, prior to the mediation.
- Decide whether or not to use PowerPoint or some other electronic media in your opening statement.
- Prepare your opening statement carefully and be prepared to present it without using notes.
- Talk with your client about whether or not the client will say anything during the opening session.

II. COMMON PROBLEM AREAS

As indicated above, timing is very important in mediation. The case should be developed to the extent that the parties can accurately evaluate their chances of success at trial. If expert testimony is important to the case, the parties should have at least exchanged expert reports before the mediation takes place if not be in possession of the depositions of the experts. I have been involved in mediations where there was no report from the expert and there was a lot of speculation about what he/she would say. This is an obstacle to settlement.

One of the most prevalent problems is that one or both of the sides involved in the mediation are not adequately prepared.

Another problem which I have encountered is that the attorneys representing the parties come to the mediation with no concept of what a reasonable range of

settlement might be. Talk to a trusted colleague about the case and come to the mediation with some idea of where the case should settle. But, do not have a hard number in mind.

Another problem that is encountered is that the true decision makers are not in attendance at the mediation. Mediation has a much greater chance of success if the true-decision makers are around the mediation table as opposed to being available by telephone or not available at all.

Other pitfalls to avoid at mediation are bombastic, argumentative opening statements that attempt to make a jury argument in a mediation setting. This is counter-productive. If the client is really upset with the other side and insists upon taking hard-line, the opening statement might best consist of just a statement that "we are here in good-faith to try to settle this claim."

There are special problems presented in mediation involving government entities. Often times, the participants at mediation can only recommend a potential settlement to a board of directors or to a governing body. In those cases, it is important to have the right people at the mediation whose recommendations will be well received.

Also, problems are sometimes encountered when the final details of settlement cannot be worked out, e.g., confidentiality agreements, non-disparagement agreements, liquidated damages if the settlement agreement is breached, return of important documents, discretionary costs, mediation costs, and secured and unsecured payment terms.

III. IMPASSE IDEAS

A. IMPASSE QUESTIONS

The following are some questions which I may ask if I sense that the mediation is headed toward impasse.

- Mediator uses “what if?” questions (listener hears that other side has to make a concession first).
- I may ask one side to put aside their belief in the strength of their case and tell me what areas relating to their case concern them.
- Sometimes I ask a party who is finding it particularly difficult to move toward settlement to summarize the possible strong points of the other side’s case.
- I also may bring up the question of whether or not additional discovery may disclose information unfavorable to a particular party.
- As always, it is important to discuss with the party that is having trouble moving towards settlement the fact of litigation costs and stress and strain of trial preparation and trial. (Mediator asks: “Well, what happens next in this case if it does not settle?”).
- In some cases, it is important to remind a party about the publicity of a public trial which may adverse to them.
- Consider partial settlement of the case.
- Often it is a good idea to ask a party who is having trouble moving toward settlement what about the other side’s current proposal is unacceptable.
- Sometimes it helps to ask the party having difficulty moving toward settlement why they think it is in the other side’s best interest to accept their proposal.
- If I find a case in my own research that casts some doubt upon the viability of a party’s claims or defenses, I will read that case and bring it to mediation. I will tell the party that is having trouble moving toward settlement that I am not going to disclose the case to the other side unless they already know about it, but that I think that the other side may well discover this case in their trial preparation and I want to know what their reaction to the possibility of this case becoming known to the other side.

B. BRACKETS

One of the traditional methods of breaking impasse is to try to get the parties to agree to a bracket within which the bargaining will take place. This is useful where the parties are very far apart and moving in incremental steps. The mediator proposes that future bargaining would take place within certain brackets. For example, if the parties are at \$50,000.00 and \$200,000.00 I might propose bargaining between \$100,000.00 and \$150,000.00.

It does not take a genius to see that the midpoint of the spread at which the parties appear stuck is \$125,000.00 and the bracket the mediator is proposing has the same midpoint. But, it does not have to work that way.

Brackets sometime work to break an apparent impasse because the parties are psychologically okay with making simultaneous jumps. The jumps only take each party so far and each party can tell itself that it has agreed only to go a specific number and the other side will have to make more of the concessions from that point on. The net effect is to get the parties in the same "ballpark" and open the door for getting to a final number.

C. CHANGE THE PROCESS

Sometimes it is important that key decision makers meet face-to-face during the mediation process without their attorneys and perhaps only the mediator present with them. This is especially true in the commercial mediation context. I have found that sometimes these folks speak each other's language and are anxious to reach a

resolution of the case. They usually get down to specifics quite rapidly. I would only do this with the consent of the attorneys for the respective parties.

I know of a mediator who, with the permission of the attorneys, treated the CEOs of two companies locked in a dispute to dinner the night before the mediation. The only rule was that no one would discuss anything about the mediation at dinner. The dinner conversation centered around the CEO's children, grandchildren, and their respective business careers. The next day, the case settled.

Sometimes I pull the lawyers out of the mediation room and get their ideas on what might work. I only do this after asking permission of the clients. Brainstorming with the lawyers alone (either the lawyers for one side or lawyers for both sides) often frees up a lot of inhibitions and guides me toward solutions. Lawyers will throw out ideas in the mediator's presence that they are hesitant to "float" in front of their clients.

D. MEDIATOR'S PROPOSAL

It may be appropriate in a mediation approaching impasse to give a mediator's proposal for settlement. This is only done with everyone's consent. This is not an evaluation of the parties legal positions. This is done by the mediator suggesting in writing that the parties commit to a particular number for settlement. Each side is told that all they have to do in response is write on a piece of paper, yes or no. If either side says no, then the mediator just discloses to both sides that the mediator's number was not accepted. This way a party never finds out if their opponent was willing to accept the mediator's number or not. I tell them in framing the proposal that it is not my goal to please either side, I tell them that somebody is not going to be happy with

the number and that could compromise my neutrality in the eyes of one or both parties. If this approach fails, then I ask the party or parties rejecting the proposal what change in the proposal would make it minimally acceptable. I then ask their permission to reveal that to the other side.

E. MEDIATOR'S EVALUATION

As a last ditch effort in a mediation to avoid impasse, I may ask the parties if they want me to give them an opinion on a possible outcome in the case. Pursuant to Rule 31, Section 10, of the Rules of the Tennessee Supreme Court, a mediator cannot offer a firm opinion as to how the court in which a case has been filed will resolve the case, but the mediator may point out possible outcomes of the case and may indicate a personal view of the persuasiveness of a particular claim or defense.

Therefore I tell the parties that this is just a possible outcome that I will only do it if both sides agree to me providing this service. I caution them that it may compromise my impartiality if I render an evaluation of the case and it may cause me to be unable to continue with the mediation or make me less effective as a mediator. Also, if they think my opinion is wrong, it may disadvantage them in connection with further subsequent negotiations. I also caution them that judges and juries view things differently and I may be wrong in my evaluation but I will give them a good-faith evaluation of the case based on the more limited evidence than the evidence which would be available to the judge or jury after adjudication. Finally, I tell them that I am only doing this because I sense that the case is close to impasse and that they should

know that by evaluating the case it may distract them from looking at more creative solutions that might serve their interests better.

IV. NEVER GIVE UP (“It ain’t over ‘til it’s over”)

If we get to a point on a given mediation day when the case is not settled, I may ask one side of the other to put their best offer on the table and give the other side a specific number of days in which to consider the proposed settlement. I will follow up with telephone calls to both sides seeking to close the gap. This is only done if the parties consent (or at least don't say “no”) to continuing the process. At the conclusion of the day in some mediations, it is obvious that the bargaining is at an absolute impasse and I will not waste time following up.

Two valuable traits possessed by good mediators are a positive attitude and persistence. A good mediator will press ahead with both toward settlement until it is obvious time is being wasted. Surveys have shown that lawyers and parties appreciate these traits in a mediator.

Settlement discussions are characterized by anxiety and uncertainty. The cool, steady reassuring guidance of a well-prepared and persistent mediator can calm these emotions and lead the parties to where most need to be – settled and moving on with life.