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Seven steps to Effective Mediation

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CUSTOM COVER

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Settling a case before trial often involves mediation. In its most basic form, mediation is a process in which a neutral third party called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is a nonadversarial process designed to help the disputing parties reach a mutually acceptable agreement.

In mediation, decision-making authority rests with the parties. The role of the mediator is to assist them in identifying issues, fostering joint problem solving, and exploring settlement options. Since each party wants to mold any settlement to its own benefit, the actual process can combine elements of show-and-tell and poker.

Whether mediation before trial is court-ordered or voluntary, lawyers have a duty to their clients to maximize the potential for settling fairly and equitably. Of course, not all cases can be settled. Where it is clear there is absolutely no chance of settlement, you should ask the court to be excused from mediation to avoid wasted effort and any unnecessary expense.

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The mediation process varies depending on personalities, goals, and strategies of the participants—including the mediator.

However, even when a case does not resolve in mediation, the experience may prove invaluable because the information that is gleaned during negotiations may compel the parties to take a new approach to the case. Mediation affords an attorney the unique opportunity to evaluate an opponent's style and the issues an opponent will be emphasizing at trial. It will also allow the attorney to assess how well an opponent responds to the weaknesses in a case. This is often the same kind of information lawyers seek through depositions and carefully planned discovery requests.

The following tips can help produce a successful mediation.

1. Choose a mediator carefully. Opinions differ on the importance of choosing a mediator. Some attorneys believe that the choice has little or no bearing on the outcome, so they give little thought to this part of the process. However, we believe that choosing an appropriate mediator is as important and deserves as much of a lawyer's attention as selecting jurors for trial.

Unlike at trial, the parties at mediation settle the case among themselves rather than submitting to the decision of a judge or jury. However, whether in trial or mediation, lawyers are obligated to provide clients with the same level of care, be it in selecting jurors or in selecting a mediator. Lawyers who have a working knowledge of the mediators in the local circuit and who carefully consider mediators' personality styles, backgrounds, and suitability for a given case are paving the way for a successful mediation.

A mediation is essentially a negotiation between the parties and is governed by the same principles that apply to any negotiation.[1] The process varies depending on the personalities, goals, and strategies of the participants—including the mediator.

To a great extent the personality styles of the participants determine the outcome. Since the mediator's job is to facilitate a resolution that the parties and their counsel working alone cannot accomplish, the mediator's style can be a great aid—or a great impediment—to the negotiation.

Understanding personality characteristics and negotiating styles will give you an advantage at mediation. Negotiating styles may be identified and grouped according to four basic personality types: directors, influencers, steady types, and compliant types.[2]

Directors, as their name suggests, want immediate results. They accept challenges, and they make things happen. Directors seek power and authority, prestige and challenge. They need others to weigh the pros and cons of an action and calculate risks.

If you know that certain parties or their counsel are directors, selecting a directing mediator is likely to bring the mediation to a quick, but perhaps premature, conclusion. Any settlement would tend to be accomplished quickly, but your client could get shortchanged in the process.

Influencers are articulate "people person" types who make favorable impressions on others. They want to be popular, and social recognition is important to them, as is freedom of expression. Influencers need others to seek out the facts and focus on the task at hand.

An influencing-type mediator may be able to keep a mediation socially lubricated, so that directing parties do not reach an impasse or walk out too soon. The chances for a settlement between two directing parties would tend to be increased with a well-respected, influencing-type mediator.

Steady types are patient people who focus on getting the job done. They want security and prefer the status quo unless valid reasons indicate change is necessary. Steady types need others who can react quickly to unexpected change and extend themselves in new ways to meet the challenges of an accepted task.

A steady-type mediator could be particularly effective when the parties are influencers, providing a patient focus on the facts and the job at hand. Any settlement would be more likely to account for all the facts and needs of the parties. Details that otherwise might be overlooked by influencing or directing types will more likely be covered.

Compliant types tend to concentrate on key details. They focus on key directives and standards. They want a sheltered environment with standard operating procedures and security. Compliant types need others to delegate important tasks and expand their own authority.

A compliant type may be most useful in a mediation between director and influencer parties, accepting delegation of various tasks and providing no challenge to the parties' desire for control and expression. In this situation, a settlement would likely take into consideration the concerns and fully articulated positions of the parties. The compliant-type mediator, under the circumstances, would act more as a messenger between the parties.

The implications of this kind of analysis for the mediation process are readily apparent. The point is that the process and outcome of any mediation will depend, in large part, on who the participants are. So, it is important to select a mediator appropriate to the psychodynamics of a particular case, given the parties, issues, and counsel involved.

2. Prepare for mediation, and know the client's bottom line. Prepare and plan the mediation as if you were preparing for trial. Show confidence, commitment, and professionalism at every stage of the process. Remember, the opposing party is evaluating all aspects of the mediation.

Be prepared and prepare your client, because the possibility always exists that the mediation will reach an impasse. Be sure the client is prepared to discontinue the process if it appears futile.

Know the client's bottom line. Confirm it beforehand, and be clear about this. If you are ambivalent on this point, your ambivalence will be construed as less than a full commitment to the client's position. Be prepared to end the mediation if it becomes clear that the client's bottom line will not be reached.

An exception to this rule occurs when new information emerges that materially affects the client's position. You then need to be prepared to work with the client to agree on a new bottom line so that the mediation can continue.

Clients who are well informed about the process are more relaxed and make a better impression. Ensure that the client knows the purpose of mediation, the gamesmanship involved, and the likely goals and strategies of the other party.

Clients need to know that they are an integral part of an effective presentation and that they should display an appropriate attitude during the mediation despite any negative feelings they have toward the other party. Clients should come to your office appropriately attired and ready to finalize strategies at least two to three hours before the mediation begins.

Communicate clearly to the client what the odds of a successful outcome are if the case goes to trial. The client is relying on your guidance to make informed decisions. Analyze all offers from the other side with realistic expectations.

Make counteroffers that consider the client's bottom line, the appropriateness of the last offer discussed, as well as the history of the mediation's give and take. However, do not consider how long the mediation has already taken. Mediation can reach a good result at any time, be it 1 hour or 23 hours into the process. Always

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try to approach each point in the negotiation with fresh energy to avoid mental traps that could adversely affect the client.

3. Negotiate at a time and place that is advantageous. Avoid negotiations that take place too early or too late in the day or in too close proximity to another unrelated, important event, such as an important hearing on the same day. You need to be able to adjust your schedule to stay longer than planned for your client if the mediation is flowing and purposeful. Ensure that all the key participants are as focused and alert as possible. At minimum, the mediation should take place on neutral, comfortable ground that is convenient to counsel, client, and mediator.

You and your client should arrive early to familiarize yourselves with the environment and the surrounding facilities. Avoid bringing along the entire case file, but do have all supporting documents, such as accident reports, medical records, applicable case law, and economic loss analysis. If necessary, also bring appropriate support staff to assist with document retrieval.

When possible, use this time to set up visual aids that will keep the mediation visually lively. Make sure all electronic equipment is operational and correcty positioned. In personal injury cases, use blow-up exhibits of the client's injuries and other key pieces of evidence. Mount on poster board and visually enhance important documents and critical medical records, just as you would for trial. A little extra expense and attention to these details could make a tremendous difference in the way your case is evaluated by your opponent.

4. Share information strategically. By the time a case reaches mediation, quite a bit of information has already been disclosed by each side, particularly if the case has been litigated for a while. Before putting the matter into suit, you may have presented the other party with a demand package that disclosed your theory of liability and outlined your client's damages. At the mediation, you should build the initial presentation on this previously disclosed information, emphasizing the elements that support a favorable settlement.

It is possible that the other party and the other party's counsel have taken a relatively routine approach to the case until the mediation. Use mediation to hammer home your case, exposing the reasons why the plaintiff will win big at trial.

Address your case's potential weaknesses, but also explain why the strengths of your position outweigh any weaknesses and why you will obtain a favorable verdict at trial. Let the other side see how the case will play to a jury.

In some cases, it may be advantageous to show a short video highlighting the strengths of the case. The video should include excerpts of depositions of key experts and before-and-after witnesses, scenes of the client before and after the injury, newspaper articles noting the client's achievements, and accolades awarded to the client before the injury. These can take any form desired, as there are no evidentiary rules at mediation.

Remember, there are no guarantees that the case will be settled. Even though each party should arrive at mediation prepared to resolve the case in good faith, part of the other side's motivation may be to pre-pare for trial—not to actually resolve the case. Do not disclose any more elements of your position than you have to in order to achieve a satisfactory settlement that is fair to all the parties.

On a related note, reserve some information to use later in the mediation. A suc-cessful mediation may take hours to resolve. If you allow your opponent to understand your position too early, he or she will make an offer based on that understanding. Withholding some information allows you to reveal your position in stages, and a more satisfactory settlement for all parties is likely to result, based on a better understanding of your client's position.

5. Prepare the mediator. Several weeks before the mediation, prepare a written overview of the case—for the mediator's eyes only—that gives a quick, accurate reference to all pertinent information, and hand-deliver it to the mediator immediately before the mediation. Stamp it confidential, because this is your work product, which reflects your mental impressions of the case.

For example, in a personal injury case, include the client's name, date of the collision, current age and age at the time of the collision, and employment information and earnings on the date of injury. Also provide the facts of the case, counsel's theory of liability and the other side's defenses, as well as why those defenses fail or don't materially affect a favorable outcome for your client. In addition, give a detailed description of the client's current damages, including all injuries, the impact on the client's life, the assessments of all treating physicians and other experts, related medical bills, and out-of-pocket and earnings losses.

Include a detailed description of the client's future prospects. Provide specific information about the client's future economic losses, including medical needs and earnings capacity losses prepared by an economist or vocational rehabilitation consultant. Also give a summary of the insurance limits or resources available from the other party and any coverage issues that may apply.

A good mediator should be impartial, which implies a commitment to aid all parties, not any individual party, in moving toward an agreement.[3] This commitment is mandatory in Florida, which has adopted mediator qualification requirements and to our knowledge is the only state to implement a disciplinary process for mediators.[4] Nothing in this obligation, however, precludes the mediator from making a professional determination that the case should be resolved on one party's terms. In fact, any agreement based on the mediator's impartial view of the merits of each side's case will be entirely appropriate from the perspective of the mediator's statutory or ethical obligations, as long as the mediator remains impartial.[5]

If you are comfortable with and respect the mediator, let him or her be your sounding board. When meeting privately with the mediator, be candid when discussing any offers the other side may have made. If uncertain, ask the mediator for strategic input as to what the next move in the process should be.

Mediation statutes generally provide that, with certain very limited exceptions, nothing that is said to a mediator during private caucus may be disclosed to the other party or anyone else without the disclosing party's consent, and the confidentiality of all mediation proceedings, including any disclosure of records or materials, must be maintained.[6] This confidentiality requirement encourages open and honest negotiation by the parties.

A good mediator will recognize the strengths and the weaknesses of the plaintiff's case—and the defendant's—and steer both disputing parties toward a fair and equitable result.

6. Use the mediator as a messenger. Certain information cannot be conveyed to the other side without evoking adverse—or even hostile—reactions. For example, a non-negotiable aspect of your position can rarely be brought directly to the other party without causing that party to raise an equally non-negotiable position. This can be unfortunate, because these delicate facts may be the key to a successful negotiation. By expressing this information to the mediator in private and encouraging the mediator to communicate it to the other side, potentially explosive reactions may then be defused.

The mediator's job is to move the parties off their initial positions toward settlement. Provide the documents, facts, or theories that go to the heart of the other party's weaknesses to gain additional leverage for your client. Doing so helps bring the other side closer to a fair settlement.

Although being candid with a good mediator is important, let the mediator discover all the case facts over time. A mediator who understands the plaintiff's bottom line too soon will spend less time exploring available options and may miss an opportunity to effect a more equitable settlement.

A mediator who arrives at a gradual understanding of the plaintiff's position will be more likely to engage in new methods of problem solving to settle an old and frustrating problem. Remember, mediation is a journey for all the participants, and shortcuts may shortchange the process, possibly to the client's detriment.

For example, there is often a chance—however slight—that you could be underestimating the value of your case. In fact, the opponent may be willing to pay more than your client's bottom line. By allowing the mediation process to run its course, both sides may facilitate a creative solution in which the parties reach an unexpected—but mutually agreeable—settlement.

7. Seal the deal in writing. A clearly written agreement is the goal of mediation. Ensure that this document carefully describes the intent and agreement between the parties and is signed by all parties and their counsel. The time frame for all payments should be clear, as should any unacceptable release terms. This way, elements of the settlement not explicitly addressed in the written agreement will be unenforceable.

The agreement should be written by one person, with input from each of the parties. This reduces the opportunity for error that can result when too many hands create a document. The agreement can be comprehensive or merely memorialize the basic elements of the settlement, depending on how the parties wish to construct the binding aspects of the agreement. At a minimum, the agreement should ensure that all the key elements of the settlement, including the respective obligations of the parties, are sufficiently detailed so as not to be subject to interpretation later. Ambiguity can kill the deal.

Given the evolving trend toward mediation as a viable and sometimes mandatory exercise in dispute resolution, the future promises to test the traditional role of trial lawyers in ways that will challenge their imaginations and creativity. Trial lawyers need to be alert to maximizing the potential benefits that mediation may bring to their cases. ✝

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