

Preparation for Successful Mediation

By Lawrence R. Mills

Just as mediation is an art, and not a science, I have learned the hard way over many years that there is an art to advocacy in mediation. Although not all cases can or should settle in mediation, if you are going to take the time and trouble to retain a mediator and schedule a mediation conference, you want to prepare thoroughly to increase the likelihood of a successful mediation.

Once you decide to take a case into mediation, you need to select a mediator with a personality, approach, and experience suitable for the case. In choosing a mediator, I regularly consult with other lawyers, institutional alternative dispute resolution (ADR) provider organizations (such as the American Arbitration Association and JAMS), and mediators' ADR profiles that may be published or available through the internet. While conventional wisdom characterizes mediation styles as either evaluative or facilitative, in reality there is a broad spectrum of mediator styles and a particular mediator may adapt his or her style to the needs of the case. You should not overlook the possibility of having a peer lawyer, who is not necessarily trained as a mediator but has handled cases like your case, serve as a mediator as long as that lawyer is able to be a neutral facilitator.

In my experience, mediation conferences have a greater likelihood of success if I try and settle the case by direct negotiation with opposing counsel before the mediation. Attorneys have been settling cases without mediators for years. Why not give it a whirl? If you do not attempt to settle the case on your own before the mediation, the mediator will probably spend a significant amount of time early in the mediation determining the parties' positions and defining a reasonable settlement range, wasting time that could have been better spent homing in on a settlement.

To make sure everyone is on the same page at the mediation conference, share your pre-mediation memorandum with the other side and make sure they provide their memorandum to you. If you have some confidential information for the mediator, you can provide the mediator with a confidential memorandum, but consider if the confidential information you are disclosing only to the mediator would, if known to the other side, motivate the other party to settle on your terms, why keep it confidential?

The most important preparation for a mediation is with your client or client representative. First, make sure that your client or client representative has the authority to evaluate and develop settlement proposals and enter into a settlement agreement. Then, you need to prepare your client for the mediation by explaining both sides of the case to the client and sharing with the client your assessment of the other side's needs and interests. In preparing a client for mediation, I discuss candidly the risks of trying the case, the costs and attorneys' fees necessary to take the case to trial, and the potential trial outcomes and consequences of those outcomes. Recognizing that there is a range of probable results in litigation and a totally separate reasonable range for possible settlements, I do not discuss with the client any specific amount that would be a "bottom line" position.

Since the mediation process itself has been described as a poker game, you need to prepare for a mediation by thinking several steps ahead. Careful thought should be given to your opening offer in mediation because that can well set the tone for the rest of the mediation conference. For a successful mediation, opening offers should be within the credible range of possible settlement. It is important to discuss with the client before the mediation the necessity to

evaluate information and offers with an open mind and to be willing to be creative and think “outside the box” to structure a favorable settlement.

Finally, because a successful mediation always ends with a written agreement summarizing the settlement, in preparing for the mediation you should identify with the client all the essential subjects to be addressed in the ultimate settlement agreement. If you and your client enter into a mediation with the intention of negotiating in good faith – and with careful preparation for the mediation process – the prospects for a successful resolution in mediation are substantially enhanced.

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