

Plan for Success: Mediation Strategies for Successfully Resolving Litigation

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With the number of jury trials decreasing, mediation is *de rigueur* in nearly all litigation. As with trials, careful consideration of key strategic issues improves your chances of achieving the best outcomes for your clients. What type of mediator should you select? Should joint session opening statements be part of the mediation? When should you mediate? How do you engage the mediator to move the other side to the “zone of bargaining?” This panel of experienced mediators and advocates will discuss these and other key issues and strategies to employ to help you make your next mediation *est un succès*.

STRATEGIES FOR SUCCESSFUL MEDIATION

So, here you are. You have a case scheduled for mediation. You’ve been here before, so you know what to do. Done it numerous times. No big deal. You know the drill.

But have you given thought to doing things differently? Coming up with a different approach? Mediating earlier or even before suit is filed? Given any thought to how you will choose your mediator or who might be effective for your particular case? This presentation and paper will address some of those questions to set you up for success for your next mediation.

TIMING FOR MEDIATION

Pre-suit?

We usually think about mediation as an ADR device after suit is filed. But what about utilizing mediation before suit is filed? Oftentimes, parties, be they business or individuals, hire counsel to get involved in disputes even before suit is filed. Our default position is to usually wait for suit to be filed, file answers and conduct discovery, engage in motions practice, and then move to mediation. However, there are situations where the parties have enough information pre-suit to make meaningful decisions about the potential litigation, and decisions can be made about settling a case before any lawsuit is filed. **Mediating a case early can reduce defense costs and, especially in business disputes, get the parties back to productive purposes as opposed to being tied up with litigation.** Given that opposing counsel likely will have invested relatively little prior to filing suit, you also might be able to save your client some money by settling at a lower amount than might be possible after expensive discovery and motion practice. Successful pre-suit mediation often will require the parties to cooperatively exchange information and key documents/data without utilizing formal discovery mechanism so there may

need to be some willingness to exchange information. **Bottom line: give strong consideration to conducting mediation even before litigation has commenced.**

Additional timing considerations

Once suit is filed, typically the two sides follow the pattern described above before mediating. Again, the default position is to conduct discovery and get the case to the cusp of trial before mediating. **Consider whether there are certain aspects of a dispute that might be mediated earlier in the life of the lawsuit. Perhaps resolving a key dispute through the process of mediation will make resolving other aspects of the litigation easier, either through direct negotiations or an additional mediation.**

The bottom line on timing for mediation is to think differently. Mediators love to tell you that “mediation is a self-determining process.” That’s not just boilerplate: it means that the parties can craft and decide what they want to mediate, when they want to mediate, and how they want to mediate. Instead of defaulting to the standard way to proceed from a timing standpoint, think about deciding when and what to mediate as a creative way for resolving your dispute.

CHOOSING THE RIGHT MEDIATOR

Who should we choose?

Much has been written about finding the “right” mediator. Plaintiff’s lawyers in a personal injury case often want one of their fellow plaintiff attorneys to act as the mediator, oftentimes to the frustration of claims professionals. Conversely, claims professionals like to have a mediator with a “defense background” to find common ground with. However, this is another area to think differently. Scott Delius, an attorney and mediator from Atlanta, has written:

I believe that lawyers should re-think the impulse to have “one of their own” act as mediator in every case. A closer look at the dynamics of a particular case may call for a completely different approach. . . . It doesn’t do a litigating party much good to have a mediator tell them what they want to hear. Praise isn’t always necessarily what’s best for our clients. Do you really want your mediator to tell you and your client that your case is rock solid, that you can’t lose and that you shouldn’t budge an inch? Maybe your client will appreciate it, but that probably isn’t going to help you settle your case. Indeed, a good mediator asks the tough questions and points out the biggest risks to both parties. After all, that’s why you’ve come to the mediation table in the first place, to minimize your risk. How are you going to accomplish that if you don’t know what your risks are? . . . If you’re the defense lawyer, there are some instances where you should strongly consider hiring a mediator who has the experience of litigating plaintiff’s cases. If the plaintiff has unreasonable expectations, there’s nothing more valuable than having a mediator who has the ability to look the plaintiff in the eye and tell him why his case is not worth what he thinks it is.

Scott D. Delius, "HOW TO CHOOSE A GOOD MEDIATOR" NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS (November 2013), www.nadn.org/articles.html (last visited Apr 12, 2017). Encourage your client to consider selecting a plaintiff’s attorney as your mediator and also consider the

reputation of the potential mediator. A good mediator will ask the tough questions and point out the biggest risks to both parties. If a mediator has familiarity with the substantive law and the potential damages, that will be very helpful in converting the parties to become their own facilitators in arriving at a resolution.

Additionally, if plaintiff's counsel thinks they have a strong case and your client's primary goal is to settle and "buy certainty," the biggest challenge might be getting the plaintiff to the negotiating table at all. Agreeing to one of the plaintiff's counsel's recommended mediators often will solve that problem. You will still want to do your due diligence and avoid certain mediators, but agreeing to one of "plaintiff's mediators" might help you accomplish your client's goals more efficiently.

Rethinking the idea of hiring a mediator who has your defense background may be the better approach when you really need a plaintiff to hear from someone who shares the experience of representing others like them.

Facilitator or Evaluator?

Another consideration for selecting a mediator is choosing a "facilitator" versus an "evaluator." In mediation training, mediators are cautioned not to drift into becoming an "evaluator of the value of a case." Doing so could lead to mediators injecting themselves into the dispute and could affect their neutrality, especially when one side disagrees with the mediator's evaluation. However, with mediation being a process that the parties create, you may decide that your dispute is one where both you and opposing counsel are looking for guidance on coming up with a value range on a case. If so, then you may want a mediator who takes on a more evaluative role. If, however, you are looking for a mediator to assume the more traditional facilitator role, be wary of mediators who "tell you what this case is worth." In that setting, the mediator begins to overstep their role as an impartial neutral. One additional mediator type to be wary of is the mediator who merely shuttles numbers back and forth between the rooms without actually engaging the parties regarding the merits of the case. A mediator who merely shuttles numbers without asking any tough questions of either side makes one wonder whether the parties should have saved the expense of the mediator's fees and simply engaged in direct settlement discussions. Deciding on the particular mediator's style and role is a key to finding the right person to mediate your dispute to a successful resolution.

Experienced with the substantive law or experienced with the mediation process?

What about finding a mediator with experience in the particular substantive area of the law from which the dispute arises? Basic understanding of the issues in a case and how the law that pertains to the litigation is certainly useful, but should it be what drives your decision on selecting a mediator? More times than not, *the process of the mediation* and the *how the mediator handles* the mediation is more important than what the mediator knows about the substantive law. Roger Jacobs, writing in *Alternatives to the High Cost of Litigation, The Newsletter of the International Institute for Conflict Prevention & Resolution* notes a success he had in helping the parties settle a case not based on any specialized substantive knowledge, but on how he interacted with an employee in a wrongful termination case:

What enhances bonding or creating trust with the mediator? A favorite example is a difficult employment case involving discharge, with racial overtones. While working with the plaintiffs, I offered them tea, which sparked a discussion. My kitchen had a substantial tea collection. One of the women mentioned that she liked tea, and asked if I had ever been to tea. I wasn't sure exactly how to respond, but I had just returned from a trip to Bangkok. Tea service at the Peninsula Hotel was lovely and quite ceremonial. So I recounted my visit, and then asked if I could brew tea for them. They liked the idea, and I offered them the opportunity to select their tea. It was served in proper teacups. Yes, this took some time. But we bonded. The plaintiffs developed a level of trust with me. When the matter was nearly resolved, there was a question over when the plaintiffs would actually resign. After discussion, they agreed to leave their positions at the end of that same day. I do not think that conclusion would have been possible if we had not spent some time together earlier, over tea. The key is not tea. It is engaging in conduct that will build trust and confidence between the parties and the mediator. The tea is really just a metaphor. Once trust is established, the mediator is in a far better position to facilitate a resolution that will help all parties.

Roger B. Jacobs, "PROCESS PROBLEMS: INTERVENTION POINTS FOR RECURRING MEDIATION LOGJAMS" ALTERNATIVES TO THE HIGH COST OF LITIGATION VOL. 34, No. 9, 138-39 (October 2016), www.nadn.org/articles.html (last accessed April 12, 2017). Having a mediator who has the skill to make a connection with the parties to gain credibility and trust is often more important than a mediator who has experience in a particular area of substantive law.

Pre-mediation submissions

Whether or not the mediator requests a position statement, confidential and/or shared, it would be wise to produce one for the mediator as well as to invite the mediator to contact you if they have any questions about personalities of the parties involved. Many mediators contact counsel before the mediation to discuss any particular issues that may arise in the mediation and discuss whether or not the opening statements by counsel and/or the parties would be helpful rather than contra indicated.

CONDUCTING THE MEDIATION

Who should attend?

Failure to consider carefully who will attend a mediation can dramatically impact the likelihood of reaching a mediated settlement. Defense counsel must always consider whether state and local rules dictate who must attend. For example, Florida Rule 1.720 requires that the following must attend in person absent a court order or written agreement among the parties to the contrary:

- (1) The party or a party representative having full authority to settle without further consultation; and
- (2) The party's counsel of record, if any; and

(3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

Florida R. Civ. P. 1.720(b). (Similar requirements are contained in many federal and state court rules on mediation). The Rules explain that a "party representative having full authority to settle" means "the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party." *Id.* at 1.720(c). If your client's required participants fail to appear for mediation without good cause, the Rules require a court, upon motion, to impose sanctions that could include mediation fees, attorneys' fees and costs. *Id.* at 1.720(f). Always keep this in mind when preparing for mediation.

In jurisdictions that do not dictate who must attend a mediation or in private mediations (i.e., those that are not ordered by the court or otherwise governed by court rules or state statutes), defense counsel should think about what signal the other side might read into mediation attendance. If a high-level in-house lawyer or executive attends, will opposing counsel believe that the client is afraid of the case (and therefore willing to pay more to settle)? Or will the decision to bring no client at all lead opposing counsel to conclude that your client is not mediating in good faith? Does bringing an insurance carrier representative to the mediation automatically put dollar figures in opposing counsel's eyes? Does a junior lawyer's attendance in lead trial counsel's place give the impression that your client has no intention of trying the case? These and many related questions are worth your careful consideration before every mediation.

To meet jointly or not meet jointly: that is the question

Many mediations start with a joint caucus where the mediator introduces the parties to the process and then asks each side to share their position. This is a great opportunity for you, as the advocate, to speak directly to the other party. In some parts of the U.S., nearly all mediations start with an opening session or caucus. In other regions, opening statements are the exception rather than the rule. Where they are common, mediators use this time to explain to the parties their role and what will take place. After the mediator's opening is concluded, parties are typically invited to give their openings. More and more attorneys are using this as an opportunity to speak directly to the other side. This is an opportunity for defense counsel and the client to make an impact on the other side, either positive or negative. When the plaintiff's attorney or the plaintiff are giving their opening, are you giving the other side your full attention? Are you making eye contact and showing the physical signs that you are listening? Or are you typing notes on a computer or fidgeting with your phone? How about your client? When the clients are distracted by their computers, phones, or otherwise distracted, the client is sending the message that isn't focused on the process and is more concerned with something else. By focusing on the plaintiff's attorney and the plaintiff in openings, you can convey that you are there to hear what the other side has to say. Oftentimes, if an opposing party can tell their story

and know that someone has heard them and acknowledged what is important to them, they will have progressed a long way toward agreeing to resolve the case. Use the time in openings to communicate, both verbally and non-verbally, that what the other side has to say is important. You might not agree with everything they say, but they have a right to say it. Letting the other side know they are being heard communicates that and helps diffuse emotion, creating a conducive environment for settlement.

Effective openings from the Defense

How about the openings for defense? After you have done a great job of listening and being respectful, you can blow up a mediation by making antagonistic, sarcastic, or disrespectful remarks. There is a way to be powerful but low keyed; to make your point forcefully, but not in a demeaning or degrading way. You can tell a plaintiff that you do not think they have much of a case without being insulting or disparaging. Oftentimes the mediation may be the first time a plaintiff hears they have problems with their case. Which way do you think is more persuasive and would lead to resolving the case: Antagonizing and demeaning a plaintiff? Or pointing out weaknesses in their case in a respectful and measured way?

Mediator's Role in Talking to the parties

It is sometimes best to leave it to the mediator to hear the plaintiff's story in the individual caucuses, which additionally enables the mediator to empathize with the plaintiffs and leave them with the impression that someone has finally heard their story and validated their feelings. Additionally, doing so will provide an opportunity for the mediator to not only ask about the incident but how it has affected the plaintiff and what they hope to achieve in the case. A similar inquiry would be made to the defendant, and these conversations will assist in making the parties their own facilitators.

Preparation, Preparation, Preparation

Just like trial work, mediation is most useful when the parties are well-prepared. Preparation includes knowing the strengths and weaknesses of your case, as well as the strengths and weaknesses of the other side. Preparation also includes anticipating arguments from the other side and being ready to deal with them. An effective mediator will ask probing and challenging questions of both sides about the case. As an advocate, you must be prepared to answer them so the mediator can utilize that information to challenge positions and assumptions the other side may have. All of this moves the parties closer to resolution.

“It's not about the nail”

Many have seen the You Tube viral video, “It's Not About the Nail.” <https://www.youtube.com/watch?v=-4EDhdAHrOg> If you haven't seen it, it is a classic example of how men and women communicate differently and have different needs. One of the key take away points is the importance of listening to the other person and making sure they are heard, instead of injecting your solution to their problem.

Likewise, effective communication in mediation is essential. Once the parties move from the joint session to private caucuses, one of the greatest challenges a mediator faces is how to get parties who are entrenched in their positions to view a case differently or to begin to see the other side's point of view. The mediator has to accomplish this difficult task without deciding anything for the parties or injecting his or her opinion into the process. A key skill is active listening. An effective mediator will do a good job of explaining what will be taking place to those who are new to the process. As discussed above, talking to the plaintiff in the first private caucus and asking them to tell their story helps the mediator learn more about them and their case. This is a good time for the mediator to learn about the incident that led to the lawsuit, how this has affected the plaintiff, and what they hope to get out of the case. Active listening involves hearing what the other person is telling you, and repeating it back to them in some way to let that person know they are being heard. This gives the person a chance to tell the mediator if she has it right and correct her if she doesn't. That also accomplishes the goal of making sure the person (often an emotional and upset personal injury victim) feels like someone has heard their story and validated their feelings. Dealing with the emotional issues that invariably come with litigation, whether personal injury cases or business disputes, is a key to getting the parties away from emotional responses and towards a rational approach to resolving the case.

“Don't give up on me, baby.”

Mediation itself is a process and takes patience from everyone, including the mediator. Effective mediators continuously ask each party questions to have them re-evaluate their positions in an effort to break through barriers to settlement. Many mediators end up using brackets to move parties from entrenched positions. Bracketing, basically defined, is “offering to negotiate in an explicitly stated range, ideally substantially narrower than the last bid/offer.” Shirish Gupta & Paulina Torres, *EXPEDITE YOUR SETTLEMENT USING BRACKETING*, LAW.COM (2017), https://www.jamsadr.com/files/uploads/documents/articles/gupta_law_expedite-your-settlement-using-bracketing_2017-01-13.pdf (last visited Apr 12, 2017). Even if not accepted, brackets can give a “roadmap of the other side's expectations.” *Id.* “Bracketing works as a kind of bridge that helps carry negotiators far enough toward the other side, and far enough into the negotiating process, that they are prepared to reveal their cards and see whether resolution is possible. It serves the very practical function of keeping parties at the table when further bargaining seems, but is not in fact, hopeless.” Michael D. Young & Marc E. Isserles, *Overcoming Impasse at Mediation: Bargaining with Brackets*, 255 NEW YORK LAW JOURNAL 25, February 2016, <https://www.jamsadr.com/files/uploads/documents/articles/isserles-new-york-law-journal-feb-2016.pdf> (last visited Apr 12, 2017). Bracketing may not be right for every mediation, but it can be a useful tool in the right setting.

“It's not about the money.”

Whenever we hear someone say it's not about the money, what do we always think? It's about the money. In civil litigation, we compensate plaintiffs with money damages, so mediation is often about coming up with a settlement figure that both parties can agree on to settle the case. However, mediation provides an avenue for coming up with creative ways to resolve disputes. Business disputes and employment disputes probably offer more avenues for offering things

besides money to resolve cases. These might include continued business relationships, letters of recommendation for employees leaving the company, or perhaps a well-written and sincere apology in a medical malpractice case. But thinking about other non-monetary things parties can offer to settle cases is something only mediation can offer. So, when someone says “it’s not about the money,” take them up on it and seek creative ways to make a non-monetary offer to bring about a settlement of your dispute.

CONCLUSION

Mediation is a great opportunity to bring finality and resolution to protracted litigation. Instead of approaching your next mediation in the same manner you have before, think differently to bring about better results.