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Keys to Successful Mediation

Business people and their attorneys recognize that mediation is low-risk, cost-effective, and confidential, and that it enjoys a 90 to 95 percent success rate when conducted by an experienced mediator. The mediation process is far less expensive than litigation, both in terms of attorneys' fees and costs and of downtime for company employees involved in discovery and trial preparation.

Through mediation, it is possible to preserve business relationships. Perhaps even more important, mediation makes it possible to maintain some control over the risk of a stunning loss resulting from relinquishing the determination of the case to an arbitrator, judge, or jury. Especially when a dispute could give rise to dire consequences for a business, officers of a company often prefer to retain control of the outcome and opt for the certainty of a mediated resolution.

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Nevertheless, even experienced counsel may fail to take the steps that will increase the

Exchange Briefs

When attorneys submit confidential briefs to the mediator without exchanging them, the opposing side will often come to the mediation table without a clear idea of the opposition's view of the case and what it hopes to achieve at mediation. Even worse, the mediator may have to spend the first half of the day clarifying basic information. Although one purpose of writing a brief is to educate the mediator, an equally important goal is to educate the opposing party and impress them with the strength of your client's position.

Particularly in a complex commercial or construction case where the issues may be numerous and the damages substantial, the best practice is to exchange comprehensive briefs. Outline your client's view of the facts and the law relating to the main issues and list the damages along with the rationale for the calculation. Opposing counsel will need to review your key documents in order to accurately evaluate the case, so attach those. There is no point in concealing documents that can be obtained in routine discovery. Remember that the decision-maker on the other side, perhaps the company president who has flown in from another state, may not be up to speed on the details of your claim or defense. Exchanging briefs helps the parties come prepared to move promptly into meaningful negotiations.

If there is specific, confidential information that you need to raise only with the mediator, it is best to address it in a separate letter for the mediator's eyes only, as a supplement to your mediation brief. Or, since ex parte communication with a mediator is allowed, you may call the mediator in advance to discuss sensitive issues.

mediation advocacy. Litigation advocacy can be successful even if it is aggressive and non-conciliatory. By contrast, mediation advocacy is most likely to be successful when all participants openly discuss the factors contributing to the dispute, the merits of each party's legal and factual position, and potential

chances of settlement and provide a positive benefit to their clients. Here are some suggestions for a successful mediation:

Consider a Range of Options

Before the mediation, you will no doubt discuss a range of settlement possibilities with your client. Sometimes, parties decide in advance on a specific dollar range, including the very highest amount to be offered or the lowest to be accepted. That approach is a mistake. Premediation meetings are better spent thinking about how the case looks to the other side and analyzing what their needs may be. Keep an open mind and consider many options.

At mediation, your client will have an opportunity to hear about the weaknesses of your case from the point of view of the opposition. And the mediator's job is to create doubt in your client's mind. Stay flexible and be willing to take a fresh look at the case. Be prepared to learn something new that will cause your client to re-evaluate his or her settlement position. Then, you may want to reconsider your bottom-line and even explore options that include something other than money, such as an agreement to do business with the other party in the future or to accept services in trade. Such arrangements may be far more valuable to your client than a monetary settlement and may be the only way to bridge the gap between the parties.

Make an Opening Statement

At the beginning of the joint session, counsel are invited to, and frequently do, make an opening statement. Some attorneys, anxious to cut to the chase, feel that an opening is not necessary because opposing counsel is familiar with their position and/or because they have outlined the key points in the mediation brief. Do not miss this valuable opportunity.

It is an unfortunate fact of life that the mediator, opposing counsel, and the decision-maker for the opposing party do not always appreciate the strength and rectitude of your client's position. Making an opening allows you to use (and your client to see you use) your best advocacy skills to force the other side to take a hard look at the case from your client's point of view and to give them a taste of how the case might look at trial. So take the time to outline your client's view of the case orally. This is your chance to look the President or CEO of the opposing company in the eye and use your persuasive powers to point out the strengths of your case and the vulnerabilities of theirs.

If your client is articulate and familiar with the details of the dispute, you may want him or her speak to some points. That way, you can demonstrate your client's strength as a witness if the case must proceed to trial. On another level, too, your client is in the best position to send the message that the company is interested in a reasonable resolution and open to discussing a variety of possibilities.

Stifle the Impulse to Insult

A cautionary word about "advocacy skills:" there is a world of difference between litigation advocacy and solutions. Show respect for the opposition and work toward a deal that makes business sense.

That is not to say that there will not be strong expressions of negative opinions and emotions. And this "venting" is not necessarily bad. A good mediator understands the transformative potential of acknowledging and validating negative feelings, and is expert in the art of handling outbursts.

But participants should stifle the impulse to announce that the people on the other side of the table are crooks or bigots or have "cooked the books." Insults are likely to harden the other side's resolve, thereby preventing your client from obtaining a successful resolution; they may even cause the other side to walk out of the mediation. Keep your eye on the ultimate goal: helping the parties put their differences behind them

Deborah Rothman

Bring the Right Participants

Mediation is a dynamic, multi-sensory process the nuances of which cannot be accurately conveyed, much less summarized, to an absent decision-maker. The ideal mediation process involves the dismantling of mistrust and enables the participants to hear, not just listen to, each other with more empathy and less skepticism. This process enables participants eventually to soften their positions and find a resolution that puts an end to uncertainty and is far superior, business-wise, to a litigated result. The absence of a decision-maker undermines the process.

A "decision-maker" is a person without whose participation the dispute cannot be resolved. Though that definition sounds straightforward enough, in actuality it can be tricky for counsel to identify the true decision-makers. In a sexual harassment case, for example, the employee's husband may have a significant investment – emotional, financial, and perhaps even religious – in the way the matter is resolved. If the couple has agreed in advance on conditions, such as a dollar amount, the immediate termination of the alleged harasser, and an apology from

the HR Director, the wife will find it difficult to deviate from those terms. Therefore, consider whether spouses, adjusters, CFO's, HR Directors, and/or department heads from whose budgets the settlement will be deducted, should be part of the mediation team.

Sometimes, counsel invite too many people to participate. It is difficult to negotiate with a group of eight or ten or more. The representatives tend to adopt a group mentality regarding the case and to reinforce each other in that view, thereby preventing the decision-makers from re-evaluating the case in the light of new information. Also, some of the participants may have been involved in the disputed transaction and may be more concerned with defending their actions than with fording a business resolution. The Project Manager in a construction case may focus on trying to explain why it is not her fault that there were cost overruns and delays rather than finding a way to save the company from the risk and cost of trial.

In many complex commercial cases, such as partnership dissolutions, the testimony of an accountant or other expert will be central. Consider inviting your expert to the mediation. Be sure to contact opposing counsel in advance and agree that both sides will bring experts. If only one side presents its expert, the other side may be reluctant to negotiate in a belief that it has been put at a disadvantage. If both experts are present, they may be able exchange views and then assist in outlining a workable settlement.

Prepare Your Client

In an effort to maintain control, some attorneys may tell their clients to remain silent at mediation. Silencing an informed and articulate client can be a big mistake. Your client actually may be the best person to outline the facts, since he or she may know the details and chronology, and may be more credible than counsel. Also, your client's sincere expression of a desire to find a resolution, especially if coupled with an acknowledgment of his or her own distress and an expression of empathy with the opposing party's distress, can soften the other side's settlement posture. Finally, after a long negotiation, it often is in a private meeting of both sides' decision-makers with the mediator that the party representatives are able to outline a resolution that can be firmed up after consulting with counsel.

Since your client should be an active participant, you must do some advance preparation. Prepare him or her for a dynamic process where participants will express many opposing points of view and where expressions of outrage, and even some yelling, are likely. There may be boredom while the mediator caucuses with other parties and there may be no real breakthrough until late in the day. The mediator will ask some challenging questions, offering little comfort to your client, and undoubtedly will spend some time focusing on the weak points of your case. The first demand may be very high or the first offer far too low. When the parties are prepared in advance for these events energy on preparing a thorough confirmation of their settlement before departing.

Consider also whether to bring an agreement drafted in advance with blanks to fill in. That is fairly standard in personal injury suits or in straightforward employment matters. But in a complex, one-of-a-kind commercial matter, such an agreement is likely to be perceived as one-sided. Draft the final settlement agreement later, submit it to opposing counsel, and and understand that they should do some thinking about a persuasive rationale for each demand or offer, they will be in a good position to get the most from the process.

Finally, having your client actively participate in the mediation may allow him or her emotionally to move free of the dispute, towards resolution and closure. Constructive interaction with the mediator and the other parties often provides clients with an important sense of having their "day in court," allowing them to better weigh and become comfortable with the various settlement options.

Be Candid With the Mediator

Be frank in your discussions with the mediator in the privacy of a caucus. That is not to say that you should necessarily reveal your bottom line to the mediator, but you enhance your credibility and get the best assistance the mediator has to offer if you speak honestly. Be candid about the facts and the law, about the players and their personalities, and about the psychological, organizational, and emotional dynamics of the case. By all means, tell the mediator what you want to accomplish and outline your ideas for persuading the opposing side to move in that direction. As the negotiations progress, ask the mediator for some evaluation. You may be pleased to find that the mediator will reinforce what you have already told your client and that your client will be able to hear it better from an objective third party. If the mediator's evaluation is different from yours, you will at least gain an opportunity to see the case from a neutral perspective. And your client may appreciate hearing the bad news from an outsider rather than from you.

Assume that the mediator will use some of what you say to push the other side to soften their position. If there are points that you want kept confidential, mention those specifically. Also, early on, you should advise the mediator of any special settlement requirements, such as a confidentiality provision or making the deal contingent upon Board approval. After you give your offer or demand to the mediator, be sure to review what is going to be presented. That way, there will be no embarrassing miscommunications.

Draft the Final Agreement Later

Before leaving the mediation, be sure to draft a comprehensive memorandum of understanding outlining the key points of the agreement, including every issue that could foreseeably result in a dispute that might undo the settlement, and have the parties sign off on it. A handwritten agreement is fine. The document should state that it is meant to be enforceable under California Code of Civil Procedure, section 664.6 or its equivalent, and that counsel will draft a final agreement within a week or ten days. Be aware that, although counsel and clients are likely to be battle-weary after an exhausting day of negotiations, the parties and the mediator should focus their remaining

negotiate over the final version so that both sides make contributions. This "buy-in" will help ensure compliance by both parties.

Conclusion

Mediation is an opportunity to maintain control of the dispute and reach a resolution that makes more business sense than a litigated outcome. Use your best professional skills to help your client make the most of the mediation process.

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