MEDIATION FOR THE GENERAL PRACTITIONER

by

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A general practitioner can effectively use mediation for the benefit of the client. Strategies and techniques for preparing the client for mediation, written submissions, opening statements, settlement agreements and creative endings for mediations are important aspects of a successful mediation. A brief review can enhance the client's chances of success.

Mediation is a process where a trained experienced mediator facilitates an open and civil dialogue between the parties with the goal of reaching a mutually acceptable resolution.

Whether it is business mediation outside the context of existing litigation, community mediation, Community Dispute Resolution Act, MCL 691.1551 *et seq*, or the utilization of court-ordered mediation, MCR 2.411, mediation can be an effective tool to resolve disputes. When used appropriately and with the correct attitude and approach, mediation can provide a confidential means to resolve a dispute that is consistent with the parties's interests and needs.

PREPARING THE CLIENT FOR MEDIATION

The attorney should prepare the client for mediation from the very beginning because the mediation might be one of the most important stages of the litigation, regardless of whether or not settlement is reached.

The attorney should prepare the client almost as if preparing the client for a deposition. The attorney and client should carefully review the facts so the client has them clearly in mind.

The attorney and client should also prepare a first settlement proposal as well as private goals and alternatives. A determination should be made whether the client has a drop dead number and what are the best and worst alternatives to a negotiated settlement. Although many clients may have drop dead numbers, the attorney should work with the client prior to mediation to develop a range of possibly acceptable resolutions rather than only a hard and fast figure.

The attorney should carefully explain mediation basics to the client. The client should not be learning the mediation process for the first time at the mediation session. This includes the mediation procedures of confidentiality, collaborative effort, mediator neutrality and impartiality, and the fact that the mediator will not render a decision or maybe even a recommendation. The client should develop respect for the process, understand the mediator's role to help the parties communicate with each other, and understand the importance of being open with the mediator in private caucus. The client should understand that no offers of settlement will made without the client's approval but.

The attorney should develop a credible strategy and know the case, including its strengths and weaknesses. It is the rare case that has no weaknesses. The attorney should prioritize goals and try to create possible options. The attorneys and parties should be open to considering multiple options.

The attorney should educate the client to litigation realities. This includes preparing the client regarding the time, expense, and unpredictability of litigation. The client should understand that California jury verdicts might not be applicable in the Midwest and that bad things do happen to good people.

Consideration should be given ahead of time to whether some type of an apology would help the mediation process. If so, of what magnitude, by whom, when, and alternative wording for an apology?

In addition to preparing the client for the realities of the civil justice system**,** the attorney should cooperate with the mediator in scheduling. If there is a scheduling problem, the attorney should let the mediator know. The mediator should not be left swaying in the wind and the recipient of silence. Communication is the key to building trust and a successful relationship.

MEDIATION LOGISTICS

The logistics concerning the mediation can help insure a healthy environment for productive discussions. Counsel should cooperate early on with the mediator in arranging the time and location of the mediation. Some believe that the mediation has to take place at a completely neutral site such as hotel facilities or the mediator's office. However, it has been the experience of some mediators that most mediations can be effectively conducted at one of the attorney's offices if those facilities are adequate and if the space providing attorney can be removed from office distractions. The bottom line is that the attorneys and clients need to be comfortable in the location.

MEDIATION SUBMISSIONS

Written pre-mediation submissions to the mediator can be helpful. An effective submission should contain bullet points, key facts, and key cases. The submissions can have attached to them a copy of the most favorable cases with the pertinent passages highlighted. Jury verdicts in similar cases in the geographic area can also be helpful.

It should be decided whether the submissions are to be confidential or served on the other party. If the submission is confidential, it can fairly candidly list the strengths and potential weaknesses of the case. Furthermore, counsel might consider whom the submission is attempting to convince. Is it the mediator, the other attorney, the other party, the client, oneself, or all of the above? Sometimes "[t]he difficult part in an argument is not to defend one's opinion, but rather to know it." Andre Maurois, *A Little Book of Aphorisms*.

The mediator does not necessarily memorize the written submissions and may ask questions at the mediation that are covered by them. Sometimes the mediator wants to create discussion or thought on the topic. Sometimes the mediator simply has not memorialized the submissions.

The Equal Employment Opportunity Commission mediation procedure does not provide for written submissions. The mediator only receives a copy of the discrimination charge.

The parties should consider the exchange of information during the mediation. This might include information concerning new employment, insolvent defendants, medical information, new important evidence, or new legal authority and cases.

ATTENDEES AT THE MEDIATION

Careful consideration should be given to determining who will be at the mediation and what their functions will be. Should a spouse or significant other be either at the mediation or immediately available? From an employer's viewpoint, should the immediate supervisor and other management people be there? Do the attendees have the authority to settle the case?

Because the mediator controls the process, he or she ultimately determines the attendees' roles. Just because a person is an attendee does not necessarily mean that person is an equal

participant in all phases of the mediation session. For example, a significant other might not have a speaking part in the joint session but would be permitted to speak when the party goes into separate caucus with the mediator.

If a public body is involved with the mediation, the requirements of the Open Meetings Act, MCL 261 *et seq*, must be considered.

MEDIATOR'S OPENING STATEMENT

The mediator's opening statement is an essential part of the mediation process. Some mediators give a long opening statement while others may give a very short opening. While there may be a virtue to conciseness, a more comprehensive mediator opening has several advantages. The mediator's opening statement gives everyone a chance to relax, settle down, and become a part of the process. The mediator's opening also fills in the gaps or reinforces the procedures where the attorneys may have failed to do this. In addition, the mediator's opening helps the mediator establish control and earn the participants' trust.

The participants should neither look nor be bored during the mediator's opening. The other participants will be gauging and ultimately reacting to how others act and react during the openings.

PARTIES' OPENING STATEMENTS

Consideration should be given to the detail, length, and tone of the party's opening statement. Egos and emotions should be left at the door.

The client's portion of opening statement is crucial. The client might be the most articulate and knowledgeable person at the mediation. On the other hand, maybe the opposite is the case. Splitting the opening statement between the client and the attorney is sometimes helpful

because it allows some expressing by the client. The client should stick to the essential facts if presenting in front of the other side. Allowing the client to speak directly to the other side in the mediation opening statement can sometimes meet both parties' emotional needs and feelings, and can provide catharsis. Just being heard and respected sometimes goes a long way towards settlement. Often a direct presentation by a party in the opening stage can help ultimate resolution of the situation. Absent resolution or surrender, the client will eventually have to tell his or her own viewpoint in deposition and at trial.

The clients' opening statements can help set the tone. They should not be *pro forma*. A good opening statement from the client precludes hiding the client. For example, it allows an employee, maybe for the first time, a chance to listen to the supervisor. However, the attorneys have to consider the other side's reaction to the opening statement and appropriately design the statement accordingly. The opening statement can help the opposing party gauge the client's sincerity.

ATTORNEY ROLE AT MEDIATION

The attorney's role in the mediation session is different from the attorney's role in other litigation phases. The attorney should come to the mediation with an open mind. The attorney should not use threatening language. The attorney should thank the other side for attending. The edge should be taken off the attorney's remarks.

Attorneys and their clients should appreciate that the process is an important factor in mediation. In mediation slower is usually faster in the long run. Patience, curiosity, and imagination are important. All the participants have to be willing to listen. In addition, both parties must be willing to compromise and be reasonable. It is very rare that either side will settle

for either fifty cents or a million dollars. Both parties have an interest in settlement which should be recognized. The ultimate focus is on the future, not on the past, and on thinking outside of the box.

In essence, the parties are at the mediation to listen to each other. They are not necessarily there to get the facts to match. The facts might not ever match. Furthermore, "[y]ou never really understand a person until you consider things from his point of view... ." Harper Lee, *To Kill a Mockingbird*, JB Lippincott, 1960, p 36.

The parties should ultimately consider putting right and wrong in a corner. This results in a discussion of the future rather than an analysis of the perceived rights and wrongs of the past.

It is important that the participants keep the momentum going even if by small increments in their offers and counteroffers.

SEPARATE MEETINGS WITH THE MEDIATOR

The parties should understand, anticipate, and plan for caucuses or separate meetings with the mediator and the greater degree of confidentiality that these separate meetings provide. It is in these separate meetings that additional venting can occur. In addition, the mediator can conduct reality checks. The client needs to hear from others, not just his or her own attorney, about potential problems with the case. Options can be developed during the separate meetings, and bonding between the mediator and the participants can be fostered.

The mediator is not the font of all knowledge. The attorneys should be prepared to provide creative suggestions in order to enhance the mediation process.

WRITTEN SETTLEMENT AGREEMENT

It is important prior to the mediation that the participants anticipate and prepare for the drafting of a written settlement agreement, or at least a comprehensive tentative outline of an agreement, as part of the last stage of a successful mediation. Counsel should review ahead of time with the client the terms that might end up being in a settlement agreement such as confidentiality, enforcement mechanisms, and non-admission provisions. The parties should bring a proposed release and other typically used language to the mediation.

Since the mediator is not a party to the settlement agreement, usually the mediator would not sign the agreement. Issues may arise as to who will draft the agreement. Consideration should be given to all of these things ahead of time. Sometimes, since the agreement is more in the mediator's memory than anyone else's at that stage, it can be useful for the mediator to write out the essential terms of the settlement agreement while reading it out loud to the parties for concurrence. The mediator is serving as a scribe, not a drafter. The parties can then initial the terms of the settlement. The outline of the essential terms will serve as a basis for a more formal agreement.

ENDING THE MEDIATION

If the mediation results in a final written settlement agreement, that would usually be a good place to end the mediation. But what if the mediation is not presently resulting in an agreement? The decision then has to be made as to how and when to end the mediation session. A mediation session should end with a clear understanding of what will happen next. This might be another mediation session, a partial agreement, a reconsideration period, or selection of a third-party or other method to decide some or all of the remaining issues.

Sometimes the decision to end the proceedings is imposed upon the mediator by the parties. Other times it can be a mutual decision of all participants. It is usually best to have a final joint session to discuss whether and how to proceed further. The parties should anticipate that the mediator may request that they keep their most recent proposals on the table for a period of time.

After a mediation that does not result in a settlement agreement, it can be helpful for the mediator to follow up with the parties to further explore reaching agreement at a later date. Sometimes, after further reflection, parties who ended a mediation at seeming loggerheads can reach a settlement if given a face-saving means by the mediator.

CONCLUSION

Effective mediation preparation techniques for the general practitioner include (1) keeping an open mind and being flexible, (2) taking sufficient time to let the process work, (3) giving the client an appropriate opportunity to bond with the mediator, and (4) using the opportunity to directly persuade the other party of the merits of the case while keeping an open mind to the other party's viewpoint. Good mediation techniques can produce a substantial benefit for the client.