

EFFECTIVE USE OF MEDIATION

by

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This article discusses how mediation can be effectively used to represent clients. Preparation, written submissions, opening statements, settlement agreements and creative endings are suggested. Mediation is an effective tool for resolving disputes. It provides a confidential and informal process that serves the parties' interests.

PREPARING THE CLIENT FOR MEDIATION

It is crucial that the advocate prepare the client for mediation because the mediation is one of the most important stages of the case. The advocate should educate the client about litigation realities, including the litigation expense and risks.

MEDIATION LOGISTICS

Mediation logistics help insure a healthy and safe environment. Advocates should cooperate with the mediator in arranging the mediation. Some believe the mediation should be at a neutral site. Some believe most mediations can be effectively conducted at the office of one of the advocates if the office is adequate and safe. Adequate facilities provide for privacy, safety, and separate sessions.

The mediator is required to make reasonable efforts throughout a domestic relations mediation process to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede the achievement of a voluntary and safe resolution of issues. MCL 600.1035.

MEDIATION SUBMISSIONS

Written pre-mediation submissions are helpful. They should contain bullet points, key facts, key cases, and copies of favorable cases with pertinent passages highlighted. Jury verdicts in similar cases are helpful. It should be decided whether the submissions are confidential or served on the other side. Service on the opposing party is generally preferred. If the submission is confidential, it can candidly list the case strengths and potential weaknesses. The advocates might consider whom the submission is attempting to convince. Is it the mediator, the other advocate, the other party, the client, oneself, or all of these?

The parties should consider the exchange of information during the mediation including information concerning new employment, destitute defendants, medical information, new evidence, or new legal authority.

PREPARING THE CLIENT FOR MEDIATION

The client should not be learning the mediation process for the first time at the mediation. The advocate should meet with the client ahead of time and prepare a first proposal and alternatives. A determination should be made as to interests and what are the best and worst alternatives to a settlement. The advocate should work with the client to develop a range of acceptable resolutions.

The advocate should explain mediation concepts to the client. This includes explaining mediator impartiality, confidentiality, collaborative effort, and lack of a mediator decision or maybe even recommendation. The client should have respect for the process, and understand the mediator's role to help parties communicate with each other and the importance of being open with the mediator in separate sessions.

The advocate should develop a credible strategy and know the case, including its strengths and weaknesses. Consideration should be given to whether an apology would help the process. If so, what magnitude, by whom, when, and what is the wording for an apology.

ATTENDEES AT THE MEDIATION SESSION

Consideration should be given to determining who will attend. Should a spouse attend? Should the supervisor attend? Just because a person is an attendee does not mean that person is an equal participant in all phases of the mediation. An attendee might not have a speaking part in the joint session but could speak in separate session.

MEDIATOR'S OPENING STATEMENT

The mediator's opening statement is a crucial part of the process. Some mediators give a short opening while others give a long opening. A comprehensive mediator opening has advantages. It gives everyone a chance to become part of the process. It helps the mediator establish control and earn trust. The participants should neither look nor be bored during the mediator's opening.

PARTIES' OPENING STATEMENTS

Consideration should be given to the tone of the parties' opening statements. Egos and emotions should be left at the door. The client's opening statement is crucial. The client might be the most articulate and knowledgeable person there. Splitting the opening between the client and the advocate might be helpful. The client should stick to the essential facts. Clients speaking directly to each other can sometimes meet emotional needs and provide catharsis. Just being heard helps towards settlement.

ATTORNEY'S ROLE AT MEDIATION

The attorney's role in the mediation session is different from the attorney's role in litigation. The attorney should come with an open mind, not use threatening language, and thank others for attending.

Process is important. Slower is usually faster. Patience, curiosity, and imagination are keys. Everyone should be willing to listen, be willing to compromise, and focus on the future rather than the past.

The parties are not necessarily there to get the facts to match. The facts might never match. “You 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.

SEPARATE MEETINGS WITH THE MEDIATOR

The parties should plan for separate meetings with the mediator and the higher confidentiality these meetings provide. It is here where venting occurs. There are reality checks. The client needs to hear from others, not just his or her own attorney, about potential problems with the case. Options are developed. Bonding with the mediator occurs. The attorneys can provide creative suggestions.

WRITTEN SETTLEMENT AGREEMENT

It is important prior to the mediation that the participants prepare for the drafting of a binding written agreement. The parties should bring proposed release and other language to the mediation.

Issues may arise as to who will draft the agreement. Consideration should be given to this ahead of time. Since the agreement is more in the mediator’s memory than anyone else’s, it can be useful for the mediator to transcribe the agreement while reading it to the parties.

ENDING THE MEDIATION

If the mediation results in a written binding settlement agreement, that is a good place to end. What if the mediation does not result in agreement? The decision then has to be made as to how to end the session. A session should end with an understanding of what will happen next.

Sometimes the decision to end is imposed upon the mediator by the parties. Sometimes it is a mutual decision. It is best to discuss how to proceed further. The mediator might request that the final proposals be kept open for a period of time.

Hopefully the mediation results in a resolution. If not, it can end with an understanding of what will happen next. There might be another session, a partial agreement, a reconsideration period, or

selection of an alternative method to resolve remaining issues.

CONCLUSION

Mediation can be used in the best interests of the client because it is (1) flexible, (2) provides a process that works, (3) gives the client an opportunity to vent and bond with the mediator, and (4) provides a process to convince others of the merits of the case while keeping an open mind to other viewpoints.

About the Author

Lee Hornberger is an arbitrator and mediator. He was selected to the 2016 Michigan Super Lawyers list, is a recipient of the George N. Bashara, Jr. Award from the Alternative Dispute Resolution Section of the State Bar of Michigan in recognition of exemplary service, and is a member of The National Academy of Distinguished Neutrals. He is Chair-Elect of the State Bar's Alternative Dispute Resolution Section, Editor of *The Michigan Dispute Resolution Journal*, former Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, former member of the State Bar's Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators. He is an arbitrator with the American Arbitration Association, Federal Mediation and Conciliation Service, Financial Industry Regulatory Authority, Forum, Michigan Employment Relations Commission, National Futures Association, and National Mediation Board. He has made presentations for ICLE, the State Bar's ADR, Family Law, Labor and Employment Law, and Solo and General Practice Sections, and other organizations. He can be reached at 231-941-0746 and leehornberger@leehornberger.com .

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