EFFECTIVE USE OF MEDIATION

by

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An attorney advocate can use mediation to effectively represent his or her client. This article includes suggestions on how the advocate can most effectively use mediation for the best interests of the client. Strategies and techniques for acclimating and preparing the client for mediation, written submissions, opening statements, settlement agreements and creative endings for mediations are suggested.

Mediation is an effective tool for resolving disputes. It provides a confidential and informal process that is consistent with the parties' interests and needs to resolve a dispute. Mediation provides confidentiality, collaboration, mediator neutrality and impartiality. As opposed to arbitration or court litigation where an arbitrator or a judge makes the decision, in mediation, the parties craft their own resolution. Mediation can resolve existing disagreements while preserving or even strengthening the relationships between the parties.

PREPARING THE CLIENT FOR MEDIATION

It is crucial that the advocate prepare and acclimate 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 advocate should educate the client to litigation realities. This includes advising the client regarding the time, expense, and unpredictability of litigation. The client should understand that newspaper articles reporting California jury verdicts might not be applicable in Michigan, and that bad things do happen to good people.

In addition to acclimating the client to the realities of the civil justice system, the advocate should cooperate with the mediator in scheduling. If there is a scheduling problem, the advocate should let the mediator know in advance. Mediators have busy schedules too and often need to make travel or other logistic arrangements. Communication is the key to building a good working relationship.

MEDIATION LOGISTICS

The logistics concerning the mediation can help insure a healthy environment for productive discussions. The advocates should cooperate early on with the mediator in arranging the time and location of the mediation. Some believe that the mediation should take place at a completely neutral site such as bar association facilities or the mediator's office. However, it has been this writer's experience that most mediations can be effectively conducted at one of the advocate's offices, if the facilities are adequate. Adequate facilities include an opportunity for shuttle mediation and private separate sessions.

MEDIATION SUBMISSIONS

Written pre-mediation submissions to the mediator are usually helpful. A successful submission should contain bullet points, key facts, and key cases. Effective submissions may attach copies 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 also be decided whether the submissions are to be confidential or served on the other side. Service on the opposing party is generally preferred. However, if the submission is confidential, it can candidly list the strengths and potential weaknesses of the case. Furthermore, 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 the above?

Most mediators do not generally memorize the written submissions and may ask questions at the mediation that are covered by the submissions. Sometimes the mediator wants to create discussion or thought on the topic.

For example, the Equal Employment Opportunity Commission mediation procedure does not utilize written submissions. The mediator receives only a copy of the discrimination charge. The parties should consider the exchange of information during the mediation. This might include information concerning new employment, destitute defendants, medical information, new important evidence, or new legal authority and cases.

PREPARING THE CLIENT FOR MEDIATION

The advocate should prepare the client for the mediation as if preparing the client for a deposition. The client should not be learning the mediation process for the first time at the mediation session. The advocate should meet with the client ahead of time and prepare a first proposal as well as private goals and alternatives. A determination should be made in advance as to 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 advocate should work with the client prior to mediation to develop a range of acceptable resolutions rather than a hard and fast drop-dead figure.

The advocate should carefully explain basic mediation tenants and concepts to the client. This includes explaining mediator neutrality and impartiality, confidentiality, collaborative effort, lack of a mediator decision or maybe even recommendation, respect for the process, the mediator's role to help the parties communicate with each other, the importance of being open with the mediator in private caucus, and letting the mediator get to know the client. Possibly only the advocate talks dollar figures.

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

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

ATTENDEES AT THE MEDIATION SESSION

Careful consideration should be given to determining who will attend. 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 for opening statements but would be permitted to speak and vent when the parties go into separate caucus with the mediator.

MEDIATOR'S OPENING STATEMENT

The mediator's opening statement is a crucial part of the process. Some mediators give a long fifteen to twenty minute opening while others may give a brief five minute opening. While there is a virtue to conciseness, a more comprehensive mediator opening has several advantages. The mediator's opening statement gives everyone a chance to settle down, relax, and become a part of the process. The mediator's opening statement also fills in the gaps or reinforces the procedures where the advocates may have failed to do this. In addition, the mediator's opening statement helps the mediator establish control and earn all participants' trust by restating or authenticating what has probably been explained previously.

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

PARTIES' OPENING STATEMENTS

Consideration should be given to the length, detail, and tone of each 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 exactly the opposite is the case. Splitting the opening statement between the client and the advocate can be helpful because it allows some venting by the client. However, the client should stick to the essential facts if presenting in front of the other side. Allowing the clients to speak directly to each other during the opening statements can sometimes meet both parties' emotional needs and can provide catharsis. Sometimes just being heard without interruption goes a long way towards settlement.

Often a direct presentation by a party in the opening stage goes a long way towards ultimate resolution. The mediator is not the font of all knowledge. The advocates should be prepared to provide creative suggestions in order to enhance the mediation process.

ATTORNEY'S 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 any 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 the keys to mediation. 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 which should be recognized in settlement. The ultimate focus is on the future, not on the past, and on thinking outside of the box.

In essence, the parties at the mediation session must 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, counteroffers, and efforts to find common ground.

SEPARATE MEETINGS WITH THE MEDIATOR

The parties should understand, anticipate, and plan for 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. Again, 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. The parties should bring a proposed release and other "boilerplate" 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 transcribe the agreement while reading it out loud to the parties for concurrence. In this situation, the mediator is serving as a scribe, not a drafter.

ENDING THE MEDIATION

If the mediation results in a final written settlement agreement, that would be a good place to end the mediation. But what if the mediation does not presently result 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.

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.

Hopefully the mediation results in a mutually acceptable solution to the dispute. If not, the mediation can end with an understanding of what will happen next. There might be another mediation session, a partial agreement, a reconsideration period, or selection of an alternative method to decide the remaining issues.

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

This article has reviewed reflections from what this writer has experienced in civil mediations. In addition, the article has provided suggestions on how the advocate can best use mediation for the best interests of the client. The article has reviewed the basic principles for the participants of (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 vent and bond with the mediator, and (4) using the opportunity

to directly convince the other side of the merits of the case while keeping an open mind to the other side's viewpoint.

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About the Author

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