Maximizing the Mediation Experience

By Jan Frankel Schau

FOR YEARS, MEDIATION HAS increased in popularity as a less costly and time-effective method for resolving disputes. But are you getting the most out of your mediation? The following are tips to help you maximize the benefits of mediation for your clients.

Control the Flow of Information to Your Advantage

More and more frequently, mediation hearings are being conducted before substantial discovery has been completed and even before pleadings have been filed. There are often key documents and witness interviews that will sway the opposing party to reevaluate its position. Yet these documents are seldom exchanged before or sometimes even during the mediation due to concerns about confidentiality protection.

Unlike the theater of trial, which is conducted under the bright lights and scrutiny of the public eye, a mediation is done largely in the shadows or even in darkness. There is an air of secrecy and privacy associated with it that can be comforting but can also be a source of frustration. However, you and your clients can strategically let the light into mediation.

By controlling the flow of information, you can determine how much light to let in and when the appropriate moments are to raise or lower the curtains on the important evidence you have developed to get the best settlement possible. Be prepared with copies of key documents, separately paper clipped for each disputed issue. Or have the proposed statements on an iPad or laptop which you can send to the mediator to share with the other side as needed and confidentially.

As the critical issues are addressed, give your mediator permission to demonstrate the evidence upon which you will rely to substantiate your defenses or claims. This can be an extremely effective way to persuade your opponent that you are completely ready to litigate if necessary and that there is evidence of another side to the story than that which the attorney has heard from her client.

For example, in a recent pre-litigation pregnancy discrimination case, emails between the human resources manager and the supervisor concerning attempts to accommodate the plaintiff were unknown to the plaintiff or her lawyer. In the same case, the employer had taken statements from all of the other working mothers in the department, substantiating the policy and practice of accommodation afforded to other pregnant or post-partum employees.

Both sets of documents, though not permitted to be kept or used by the plaintiff or her counsel, went a long ways toward assisting them in re-evaluating their position on liability and achieving a settlement long before the expenses of litigation and discovery eclipsed the value of the case. Had the documents been provided in a big packet with a formal brief before the mediation, they would not have had the same impact as they did in slow, deliberative drips of information doled

out strategically in the confines of this highly confidential mediation.

Conduct Just the Right Amount of Formal Discovery

Albert Einstein famously said: "We can't solve problems by using the same kind of thinking we used to create them." And yet many litigators continue to believe that before a legal dispute can be resolved they need to thoroughly review every shred of evidence, including noticing and enduring a series of uncomfortable and expensive depositions from every identifiable potential witness.

You don't need to undertake such thorough discovery before mediation. In modern American litigation practice, it is assumed that every case will have opportunities for settlement, with some studies showing fewer than five percent going to trial. So why try to win by overburdening your adversary with discovery if you and your clients genuinely want to attempt to resolve the dispute?

Instead, from the moment you undertake a case, the discovery plan should consider the minimum necessary to convey your client's convictions and minimize their expense and discomfort before giving mediation a try. Oftentimes, it is only after preliminary discovery is conducted that counsel see the wisdom of engaging in settlement discussions. But after too much painful discovery, the moment may be lost in the anger, frustration and investment of time and capital that has occurred during the scorched earth phase of the litigation. In most instances, you will want to know the basis for your opposing parties' claims or defenses.

This means that if it is unclear in the pleadings, you will need some preliminary discovery, such as contention interrogatories, a basic document exchange and the deposition of the plaintiff. Unless the matter fails to settle at mediation, you don't need to take depositions of every potential trial witness, or have the plaintiff examined or experts weigh in with their opinions.

In a business dispute, for example, you probably don't need to review all of your adversaries' backup documentation before a mediation. Trust your client's side of the information and allow for some ambiguity so the process itself can work its magic. While discovery can be truly informative, it is, unfortunately, used frequently as a hammer to burden the other side with formalities. Too often, those kinds of formalities are what led your clients into conflict to begin with.

Prepare an Effective Pre-Mediation Memo

There is some controversy surrounding mediation briefs. Should they look like legal briefs? Should they provide the evidence as exhibits? Should they be exchanged or kept confidential? Should they reveal weaknesses as well as strengths? How long should they be?

You don't need to agonize about the fine points of your brief. First of all, let's stop thinking of the mediation brief as a legal pleading or motion. If we think of it as a memo to the mediator submitted in advance of the mediation, it will free the disputants and their lawyers to be a little more candid.

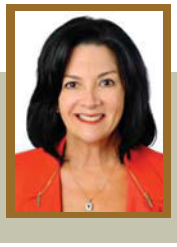
Second, do not share all of the memo with your adversary. If you choose to exchange briefs, then certainly communicate some of the finer points separately to the mediator in a less formal way via email or separate submission.

The memorandum should do what trial lawyers do best: tell the story of your case as you would to the judge or jury. Who is your client? What happened to him or her? What was the result? What does he or she want? As the defendant, you will want to highlight your defenses to this story by again answering the following questions: Who is bringing the lawsuit? What does your client stand for? What happened from your perspective? How do you evaluate the damages if liability is proven?

Briefly summarize the facts, the salient evidence, and the settlement efforts and negotiations thus far. If there are legal issues that have yet to be tested, include those, too. Feel free to ignore the rules of evidence if it means you can better highlight what your client really thinks, heard or saw. Focus on the issues where the evidence is nuanced and vulnerable to construction or inference for or against your client. That is where the real work of the mediator will kick in—helping each side to analyze and evaluate the likelihood of successful persuasion on the issues remaining in dispute.

Finally, if you can, give the mediator a heads up on your confidence and that of your client as to a particular result at trial. Although the mediator may discount it because of the typical overconfidence of litigants and their counsel, he or she will at least have a hint as to what extent you are open to compromise and concession.

And one more thing: busy mediators can't read or adequately prepare for a case if a box of documents are sent the night before a hearing. Many are mediating three to five cases per week. Make sure to get your memo in no later than the Friday before the week of your hearing, so the mediator can spend the weekend with it if necessary.



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