

MEDIATION

Get Prepared for Something Important.

Like judges, mediators get to work with some of the finest lawyers. We get to see them exercise skill in the protection of and service to their client. I have said before and will say again: many times the mediator receives credit for results, which the fine work of good lawyers produced. The truth is that a case without quality lawyers is the most difficult case, for the mediator lacks the aid of a wise litigant.

Often, however, the lawyers take the exercise of mediation in stride, cavalier, and unprepared. Never would a competent lawyer go to trial, hearing, or deposition without adequate preparation. Last month we mentioned that 80 to 90 percent of the cases settle at mediation. Therefore, here we are with the opportunity to have a face-to-face meeting with the very person who makes the decisions for the other side, and we pass it off, amazing. Only 10% or so cases go to trial, but we prepare for that trial as if it were a certainty. The more certain event is the case will settle at mediation or soon after.

I respectfully suggest that the lawyer should prepare for mediation with similar quality one prepares for other litigation components. Here are several items I might suggest:

1. Think like a businessman, a salesman, even a promoter. Your client's attitude needs adjusting by you from that of a litigant to that of a decision maker. [Last month we covered the fact that mediation is a business meeting to come to a conclusion—settle or confirmed need to litigate.]
2. Even though lawyers are generally electing not to have joint sessions at the first of the mediation, I would suggest such election might cause the loss of a wonderful opportunity. If a lawyer prepares a

presentation that is not threatening, adversarial, condescending, judgmental, accusative, he may succeed in getting the decision maker to more seriously consider the risks, costs, emotion, time, and effort before him/her in litigation. Granted, however, there are cases in which a joint opening session is not helpful. This might be where the emotions are just too great.

3. Have documents marked, in order of a good sales pitch (with a smile, so to speak) that can inform, not so much as threaten. Things like: This email might suggest to a jury that ... We all realize that there are claimed understanding; but when a jury sees a document that says ..., they may very well choose to believe what the document says and not what one claims is the understanding. Doing this kind of presentation without causing one to become defensive is critical to reaching a conversation of reality and not accusations of defeat. Some suggest it lengthens the mediation, but my experience is that it shortens the mediation. A great deal of information communicated in a joint session would take some time for a mediator to carry back and forth.
4. Prepare the client to not take this time as a fight, but an opportunity to learn, evaluate, and consider the larger picture than “just my way.” Prepare him/her for a business meeting.
5. Before the mediation, take the client through the process of mediation, pointing out its function, opportunities, and potential results.
6. The lawyer and client should have considered a desired result in light of best case, worst case, and probable case. Tell the client that added information in the mediation might cause one to change their position or expectations as reality comes into focus.
7. Think of some questions that may be asked, in the joint session or in caucus, that might help focus on the matter.
8. Think through and even prepare contractual terms that might be required to complete a settlement document. Do not risk leaving an

important issue to memory in the middle of a negotiation. Be prepared to tell the mediator these terms early on when they do not have a cost associated with them. If left to the end, the worthy opponent may very well put a price on it. Seek to get to the point that the sums negotiated include all these items.

9. Prepare and provide to the mediator, before the day of mediation, the answers to his Attorney Information Sheet. If there are documents that will better inform him or her, provide them to him. However, mark the relevant portions. Do not expect a mediator to read piles of data that are not germane to the issues.

10. Pay the mediator.

I hope that this will improve the mediation process for you in the future.