



Preparing your client (and yourself) for mediation

Preparation of the client for mediation is as important as preparation of the case.

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It is no surprise that experience suggests that preparation makes a significant difference in the kind of outcomes you can expect in mediation. The problem is we get so accustomed to one kind of “preparation” – the components of the case - that we forget that other intangibles can effect the mediation experience. This may result in lost opportunities and interfere with achieving optimal settlement outcomes.

Preparation for any negotiation or mediation involves attention to the process, the substance and emotional elements. Most counsel understand that preparation on the substance of their case is a critical feature. Preparing the client (and yourself) for challenges of the mediation process, and potential emotional impacts, seems to get less attention and can lead to unsatisfactory experiences. This article will focus upon such preparation and the reasons for it.

Process preparation

You have prepared your client for the concept of a negotiation during the

life of the case. As you and your client address the possibilities of mediation, consider changing the frame of reference for the event. Instead of looking at mediation as another in a series of adversarial events during the life of the case, try looking at mediation and the mediator as a tool or resource. Negotiation behaviors can change when counsel and parties start viewing mediation more like a joint problem solving collaboration, than cage fighting episode. Here are some suggestions:

- Discuss the reasons to engage in mediation at this time. This could involve a number of factors including risk assessment, future costs, messages from other counsel, proximity of important procedural events in the case, etc.
- Do talk about the structure of the typical caucus mediation (the prevalent model) including a joint session with all attending, signing a confidentiality agreement and the protocols for private sessions.
- Discuss how you expect to manage communications with the other counsel/parties and mediator and the sequence of events.

• Anticipate the negotiation within the mediation. You may have already had discussions regarding case evaluation with your client, but it doesn't hurt to renew these in conjunction with an upcoming mediation. Your client will probably experience some stress associated with the mediation and may forget. You can help build their confidence and sense of autonomy and authority by describing the path before you get there.

• Lay out a context for the anticipated negotiation. It is frequently described as a “dance” and clients can find the first steps demeaning, be deeply disappointed with the experience and develop a negative interpretation, which can poison the chances for success.

• Provide your client with grounding in the difference between possible and probable outcomes for the case, such as illustrated in the usual “Bell” curve; that during the mediation the possible verdicts (high or low) may have influence, but are not as meaningful as the anticipated negotiation within a reasonable range of probable outcomes. Explain that the range is based upon your professional risk assessment, case strengths weighed against discounts for defense verdicts, comparative, damage issues, relative witness potential or threshold legal issues.

Encourage your client to appreciate that getting feed-back from the mediator is one of the opportunities of mediation and that it can assist you both in refining the picture of what is a satisfactory resolution.



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As a result, mediation can be viewed as a potential learning experience about how others view the risks presented in the case.

Clients often find this threatening without an appropriate context. It helps to assure them of the voluntary nature of mediation and that they are “in choice” during the experience. The potential for outcome control, in collaboration with the other participants, is one of mediation’s strengths. If the learning environment frame is adopted they can be more flexible, adjust their sights with your guidance where you, as a team, see the wisdom in being influenced by a different point of view during the mediation. Encourage patience early in the process.

Do discuss scenarios for decision-making. One objective is helping build your client’s capacity to be a better informed decision-maker so that opportunities for reasonable settlements can be realized. Help them understand the differences between net recovery post-trial and in settlement (costs, fees, delay, certainty etc.). In doing this, you are also building support for their trust in your own recommendations.

Finally, give them the pleasant shadow of the future – a signed, enforceable settlement agreement. Many clients long for the end of litigation.

Preparing clients emotionally

Negotiations are not purely rational exercises. It is often tough enough to manage our own emotional triggers without having to concern ourselves with another person’s emotional reactivity. Yet, the risk of emotions taking over the negotiation demands that we attend to both before mediation. You can overcome many of these problems by preparing the client emotionally:

- Recognize that the client’s feelings of comfort, recognition and autonomy are essential to the success of the mediation effort, giving them a sense of their role beforehand. Respecting that role throughout the mediation will help them

arrive at sustainable resolutions, without “buyer’s remorse” and result in a happier client referral base for counsel.

- Inform the mediator of physical comfort issues which may infringe on the quality of the client’s participation which you and client cannot accommodate without some assistance. When questions, feelings arise for client engage mediator to clarify what, why or how things are going.

- Help the client anticipate the roles the mediator will play to advance a constructive session including host, and hypothetical judge, arbitrator, and/or juror, both challenging client’s case and helping you and client persuade other side.

- Engage the client in mediation strategy. What kind of joint session is tolerable for client given the nature of the case, personalities and opportunities for persuasion? Are there linguistic, gender, racial or numerical issues to consider in approaching the joint session in order to provide your client comfort in the process? Do consult with the mediator about these issues if concerned.

- Actively consider how will the client’s emotional concerns be addressed in the mediation. What does the client really want the mediator/other side to understand about the harm that was done? Are there issues that would be best left unaddressed? Ask the client about anxieties or worries once they understand what is coming and be sensitive to the signs of potential emotional triggers.

- Consider the most effective way to communicate the client’s concern so that client is assured the message has been conveyed in a way that they feel they have been heard. Many underestimate the role mediation can play as a substitute “day in court.”

- Describe the caucus sessions, confidentiality and use of the mediator. Build the client’s trust and cooperative capacity by including the client in discussions with the mediator. If you and mediator deem a private conversation is critical, make it

brief and promptly return with the mediator to discuss the contents with client and why you felt it important to discuss it out of client’s presence initially.

You should recognize the client’s decision-making status in conjunction with your professional advice. Reviewing the attorney-client relationship in a settlement scenario is a good idea. You are more than a professional consultant when it comes to settlement options that make sense to you, but which the client resists.

Discourage client notions of “bottom line,” or “winning” in the mediation, which can interfere with wise decision-making. There is still a significant value in an “unsuccessful” mediation. You and your client should have had a thorough review of the risks, seen the settlement options and developed the further necessary relationship and resolve to either alter your settlement course or proceed to trial, having consciously embraced the risks.

A word on substance preparation

If you are prepared on the substantive issues of the client, demonstrating your knowledge and mastery of the case, your clients will gain confidence in the mediation experience. This means listening well and summarizing to confirm you heard them accurately. Of course, know the latest damage developments and timely communicate them to the other side so they have time to factor them into the development of settlement authority.

Have a simple theme, supported by selected evidence and a presentation strategy for the joint session, given the opportunities available there for persuasion, impressions, etc. If it is to your advantage, evaluate whether the client can tolerate participation in the joint session in something more than a passive role. Pick a safe, but limited topic for the client to speak about (if your client’s appearance helps the case) and ask the mediator to monitor some ground rules including that any questions for the



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plaintiff are run through you or the mediator after the break-out sessions begin.

Substantively, make sure you and the client are on same page walking into the session. The tales of mediations gone badly are replete with examples from this area. Preparation in this dimension will improve your working relationship and ability to support your client emotionally and with process issues.

Summary

Preparing for mediated negotiations on the process, emotions as well as substance, will pay dividends. You will be positioning both you and your client to have a positive emotional experience by building the client's sense of worth in the process as well as trust in your role, as legal counselor.

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