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Mediations can be the Super Bowls of dispute resolution: the definitive end point for a particular conflict. Getting to the big game is one thing; playing your best in it is another. As an attorney looking to move a dispute to mediation, it's critical that all the details be considered carefully, including which mediator to use; how to effectively prepare your client for the proceedings; what to do if the mediation goes into overtime; and how best to communicate and carry one's self in front of the mediator and opposing counsel. With this in mind, and with a mediation's outcome critical, a strong "Game Day" plan helps ensure that you are best prepared for the opening kickoff.

### Gather your plays

Prepare your evidence and stand ready to share it. It can be the critical action where you gain a lot of yards. More is more when it comes to evidence. If your demand before the mediation was lower, and now on game day it is higher, provide ammunition to the mediator as to why. Simply saying you just realized this change while preparing for mediation will not help the mediator in the other room. When the mediator goes to the other side to discuss its basis, it should support your position so the mediator can present it appropriately. Also, be open to receiving ammo from the other side; this is key information that

# Mediations require a solid "Game Day" plan

Your mediation should be the definitive end point of a dispute, but getting there requires the same preparation as winning a big game

can help you assess your game plan's weaknesses and have an open discussion with the mediator in front of your client.

Another solid play is exchanging a settlement agreement with opposing counsel in advance of the mediation. For example in an employment matter, you can mutually agree to certain terms, such as confidentiality, liquidated damages, non-disparagement, and unilateral or mutual releases. These issues can take hours to write up after the matter has settled, and agreeing on these terms earlier will save you time and money. More importantly, since you have been collaborating with opposing counsel, it will build positive momentum toward a resolution.

### Action plan

You don't have to share your entire game plan with the mediator; just enough of it. For example, you may feel it's important to the process for opposing counsel to meet your client and observe them as a witness. If the clients agree to such a meeting, call the mediator beforehand and let them know of this need. The mediator will address this with the other side at the appropriate time and should manage the joint session with a few key questions, which can allow for information to pass between parties in a manner that promotes and encourages settlement. These sessions can be as brief as 10 minutes and, if executed properly, can make a huge difference in negotiations.

### Manage your clients' expectations

It's important to be open and honest with clients before mediation as to where a particular case is strong, and where it is weak. Mapping out and defending against potential arguments from opposing counsel is essential preparatory work. Be honest about the roadblocks and have ready-to-go alternative strategies to steer the discussion back to more favorable terms. As in most instances in life, overpromising is a perilous path. If you are honest with clients, they are more inclined to be forthright and cooperative with you.

You may be asked, "This mediator will go easy on us, because you know him, right?" It's important to qualify the relationship, "I do know him in a professional capacity and I find him to be level-headed and fair. Our preexisting relationship ensures that the mechanics of the mediation will go smoothly, nothing more."

### Explore all mediator options

#### • Hit the phones

Selecting the right mediator can make all the difference in a case settling. Just like your client, each mediator is different. The good news is that you have many options. If you are going to select someone you don't have a history with, there are readily available resources for conducting research. Utilizing listservs, referrals and your colleagues as sounding boards are the standard "go-tos." In addition, consider your client, their



personality, quirks and strengths and any weaknesses in their case. With this knowledge, call the mediation provider or the mediator and ask questions about their personality, experience and mediation style so you can decide if they are a good fit for this particular dispute. Look to find a balance: if you ask for a plaintiff reference, also ask for a defense reference – giving you the view from both sides. Mediators, no matter how busy, welcome these due diligence calls. They want the process to work, want you to feel comfortable and are aiming to earn, and keep, your trust. In the end, you will likely end up with an additional mediator on your “go-to” list.

• **Network to build your short list**

While attending trial bar events, find and connect with mediators long before a need arises. It’s a great idea to vet candidates at these events, as you can learn a great deal about a mediator’s personality and demeanor from in-person interaction; and, talking with mediators about their style and expertise is a great way to establish a rapport and start to build trust.

**Deliver brief briefs**

Less is more. The best way to inform your mediators of the key issues in a case is via a short briefing. Pre-mediation emails and phone calls are perfect vehicles for sharing core concerns and matter details before a mediation occurs. (This is unless you plan on sharing your brief with opposing counsel.) Attachments, documents, pictures, deposition transcripts and motions can all be shared at the time of mediation. Alternatively, if you must send attachments before an engagement commences, highlight areas of focus to speed review.

**Achieve a mediation reputation**

Building a rapport with a mediator is an essential element of success on “game day.” Mediation is an art that carries a level of respect with it; and, while the process isn’t rocket science, it requires a unique connection between attorneys, clients and the mediator.

The mediator aims to create an environment where the parties feel safe and can have free-flowing discussions, and anything the attorneys can do to contribute to fostering that environment – at any stage of the process – will go a long way toward establishing trust. Attorneys who trust their mediators and in the mediation process are more likely to share information and are more flexible in negotiations.

Building a rapport with opposing counsel is also a good idea. Call them in advance of the mediation and confirm everyone is ready and that they have appropriate people lined up. Honest and open communication between counsel can go a long way during mediation. Think of this as the pre-game handshake before kickoff.

**Yield results**

If a negotiation proves challenging, and it can’t settle on mediation day, remember that everyone agreed to be equally invested in the process. With the mediator’s guidance, strategize and follow through on what is needed for the parties to move off their positions. Follow-up calls and additional sessions over time may be necessary; and, by maintaining the same level of professionalism, appreciation and negotiation you extended at the mediation, all parties will be more inclined to reach resolution.

**Kickoff and beyond**

The often heard remark of “all sides walking away unhappy after a mediation equals a good result” is simply not accurate. Rather, achieving a fair, sound and iron-clad outcome is the guiding goal.

Just as athletes practice and learn about their opponents in advance of game day in order to perform their best, attorneys must engage in a similar process when it comes to mediation. This may be a tedious, time-consuming task in the middle of a heightened legal battle; but, it is vital to ensuring smooth and efficient negotiation and outcome. By respecting the process and knowing the rules of the game, mediations can be productive, results-focused exercises that bring closure to all involved.

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