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Settle in

Mediations succeed when clients know what to expect before they go


Cooper

By Miles B. Cooper

The lawyer and client spoke about the upcoming mediation. The client understood things, up to a point. "I get it. So the mediator goes back and forth, and tries to get us to agree to some number to settle?" The lawyer confirmed. "And if we can't agree, this retired judge makes a final decision about how the case will resolve?" The all-too-common arbitration/mediation confusion. They had a little more conversing to do.

Start early

Litigation has its own language. Complaint. Discovery. Deposition. Mediation. Using those words early, defining them, and repeating them, helps clients learn that foreign language. Litigation can be frightening. Knowing the language and having a road map helps. Later on, we want the client's internal monologue to be: "Ah, yes – mediation. They mentioned this a long time ago. We must be making progress."

As a result, mediation preparation starts shortly after taking a case in. Providing a preview of coming attractions helps clients understand the process. "At some point, we'll likely mediate. This is a process where a neutral person – a lawyer or retired judge – helps us resolve the case. The mediator works at getting us to lower our demand, and getting the defense offer raised, until we reach a mutually *disagreeable* number."

Setting a time *and expectations* for mediation

Mediations tend to be set a couple months out. When setting the mediation, one checks with the client about available dates. This can be disorienting if the first client contact is a scheduling email. Setting a mediation discussion call *before* asking the client about available dates helps. In that call, cover the high points: "We briefly discussed this early in your case. A neutral person, the mediator, tries to help us resolve the case. You will be making significant decisions and have our guidance. You also can have a family member or friend there if that will help. With every offer, we'll calculate your approximate net after fees, costs, and liens. It may settle that day. It may not. We ask you to be open to outcome, not attached to outcome." If the client fixates on settling that day, the client may collapse and demand settlement, even if the case isn't ripe.

Go over the financial implications. Provide the current costs and an over-inclusive upcoming cost estimate. Overestimating increases the client's net – underestimating reduces it. Frustration occurs when the final number is less than promised. Discuss the fee percentage. Some firms' fees shift closer to trial. If that's the case, note it. Go over the medical liens and the anticipated lien reductions, depending on lien types (I'm looking at you, self-funded ERISA plan…). Discuss tax implications. Clients are happy to hear that personal injury results are typically not taxable. We also cover structured settlements and their pros and cons, as well as lottery syndrome. Our goal is a financially secure client, not one destabilized by sudden wealth.

We then prompt the client by saying, "You must have questions. What questions do you have?" And listen. Presuming they have questions, rather than ask if they have any, encourages discussion. During the discussion, listen for resolution impediments. If it becomes apparent the client has goals unattainable through mediation, one can change course before setting an expensive non-refundable mediation.

The fine-tuning call

When setting mediation, set a final preparation call in the week before mediation. This is an opportunity to go over the high points from the last call and update with any developments or anticipated direction. Sometimes a mediation is a first dance – an engagement, but one where it is unlikely to resolve that day. This realization can manifest as mediation approaches. Communicating this before mediation helps set expectations.

One also covers mediation mechanics. With video mediations now *de rigueur*, this is the time to make sure the technology works, including that the client has the technical capacity and the link. If you have an in-person mediation, plan where to meet and confirm mobile numbers should an issue arise. Many clients are uncomfortable running into defense counsel or defendant alone. Meeting at a café nearby and going in together helps. If this is a particularly emotional case – a death case for example – knowing if the defendant will (or won't) be there is important so the client is prepared. Prepare the client for a joint session, should that be a possibility. Further, alert the client that there may be a a few softballs to answer in front of the adjuster. Finally, tell the client to text or call with even the smallest worry. We particularly don't want the client losing sleep before a mediation.

Outro

Back to our lawyer, on the phone with the client. After a lot of discussion, the client displayed a much greater understanding of the mediation process. They rang off after having set a further time to talk shortly before the mediation, and after extracting a promise from the client to contact the lawyer with any questions that crop up along the way.

Miles B. Cooper is a partner at Emison Cooper & Cooper LLP. *He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).*

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