

Help the mediator help you

The importance of the mediation brief, knowing what really is confidential and what's not, and the process of demands and offers

By Arnie Levinson

I here offer a few suggestions that can help you get the best results from your mediation. Some of these items may seem small or insignificant, but they can make a real difference.

Educating the mediator

The more efficiently you educate the mediator, the more effective that mediator can be. I say "efficiently" rather than "completely" because a mediator cannot know the case as well as the attorneys do. The attorneys' job is to effectively get the mediator to understand the meat of the case. To the extent you can, why not take advantage of ways to help the mediator assimilate your facts and arguments in advance of the mediation? Mediators can have a full schedule of cases during the day and have to read *and comprehend* the briefs in the evenings. A good working assumption is that the mediator only has so much time to learn your case. Here are some suggestions.

1. Sometimes last-minute or "late" briefs are unavoidable. However, if you can, getting the brief to the mediator well in advance can be very helpful. My personal preference is to read each brief at least twice if I have the time. The first time through gives me a general idea of the facts and legal arguments. That makes it easier for me to pick up the details when I go through it again. If a mediator gets the brief the night before the mediation, there is only so much to be done with it, particularly if the brief is long or that day's case went late. (I do employ a special method of understanding long briefs which arrive at 10 p.m. the night before the mediation. I put it under my pillow and when I wake up in the morning, I expect the brief to be magically in my head. Unfortunately, it doesn't always work.)

2. Paying attention to the length of the brief and repetitive statements can be helpful. Long introductions, which are then repeated in the discussion and conclusion are not an effective way to communicate. If one is saying it for the third, fourth, fifth or tenth time, at some point, the mediator is going to think that this has already been said and pay less attention to the discussion. If the brief is more than 15 or 20 pages, my bet is that it is highly likely to contain a lot of marginally relevant information or substantial repetition. Remember, you are still going to have the mediation itself to discuss the case.

3. If the facts or medical condition are complex, it is helpful to simplify it or break it down. The easier it is for the mediator to digest quickly, the better the mediator will appreciate your case. Sometimes, the attorney or paralegal who writes the brief cuts and pastes from a long medical summary, highly technical terms and all, and drops it in the mediation brief. And, much of the information was wholly irrelevant to the case. It is certainly more efficient to prepare, but far less efficient for a mediator to digest. There is no need to spoon-feed the case to the mediator or to treat the mediator like a jury, which lacks legal sophistication. It is simply worth thinking, "How can I most efficiently educate the mediator?"

4. Find out if the mediator is willing to read information about your case well in advance of the briefing. Personally, I like to get my hands dirty in the facts and law and I welcome parties to send me documents which either describe or are central to the case, well in advance of the briefing. For example, summary judgment motions, critical correspondences or settlement demand letters can give the mediator a good head start. If your mediator is open to reading such documents, there is no need to wait until the formal briefs are filed to send them to the mediator.

5. We all know that too much information is counterproductive in most situations. The same applies to mediation. TMI obscures your most important points.

Exhibits, exhibits, exhibits

I confess, this is a pet peeve of mine. Unless you only have a couple of pages of exhibits, I highly recommend that you do not attach separate exhibits, such as Exhibit A, Exhibit B, Exhibit C or Exhibit 1, 2 or 3. I suggest you attach one set of exhibits which contains all the documents you would like to submit and paginate the entire set beginning at page one and ending at the last page. In the old days, motions/declarations always attached exhibits by labeling them Exhibit 1, 2, 3 or A, B, C, etc. Each exhibit was accompanied by a tab, usually at the bottom, or blank pages labeled "Exhibit _" so that the reader could easily flip to the exhibit. That system does not work in the age of electronics. If I am reading the exhibits

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electronically, I must go through each page of the exhibits to find the identifying "Exhibit _." Your chances of the mediator reading the important exhibits is reduced if you make it hard to find the exhibits. If, for example, you attach 200 pages of exhibits, how is the mediator going to find Exhibit 8? Go through all 200 pages one by one until finding the page labeled "Exhibit 8"?

Whether you are attaching 10 pages of exhibits or 1,000 pages, you can dramatically advance the mediator's ability to assimilate those exhibits by following one practice. Simply attach one set of exhibits with consecutive page numbers starting at 1 and refer to the page number(s) in the brief. If you highlight the pertinent portions, a reader can assimilate the pertinent portions of many exhibit pages rather quickly. Alternatively, you can submit separately labeled electronic exhibits or you can bookmark the exhibits in your brief.

Consider sending your mediation brief to opposing counsel, even if there is no tit for tat

Commonly, a party will only provide the brief if the other side agrees to provide its brief. The perception is that, to do otherwise signals weakness in negotiation. However, there are a number of countervailing considerations. The brief is not just to educate the mediator. It is also to persuade the opposing part(ies). An attorney who has a handle on the facts and is well prepared is far more capable of presenting his or her case than a mediator who first sees the case within the past week. Similarly, a well-written brief is far more likely to persuade the opposing party than a mediator's interpretation of a party's position. Why not exercise that advantage? It also shows confidence in your case and that you are prepared. And, to the extent the mediator can present the case well, you have the advantage of both presentations.

Mediation is not a trial. One of the big advantages of mediation is to get the opposing side's responses to your claims. The more clearly you set out your claims in advance, the more likely you are to find out what the other side's response will be. The more you know, the better decisions you can make. Some attorneys feel that the opposing party has an advantage at the mediation by not disclosing its brief because the mediator will not have the benefit of the opposing party's response to the points made in the confidential brief. That may be true, but let's keep our eye on the prize. If the information is presented to the defense for the first time at the mediation, two things are likely to happen. First, the other side will not have included the information in how it valued the case and decided its authority prior to the mediation. Second, there is a good chance the case will not settle because the defense will now insist that it has to investigate and evaluate a new issue. Defendants, particularly insurers, are simply not well-equipped to evaluate new information "on the spot."

The defense is often reluctant to provide its mediation brief to the plaintiff. While this may mean that a plaintiff may not initially appreciate some of the arguments made by opposing counsel, in most cases there is nothing in the opposing brief that is either confidential or that the plaintiff does not already know. My belief is that, in most instances, it is not worth giving up the opportunity for plaintiffs to make their points themselves.

The reason that many defendants customarily do not provide their briefs is often rather benign. Typically, this is not because it contains confidential information. It is often simply a reflection of a conservative client approach that applies across the board to all cases and is wholly unnecessary in your particular case. Rather, it is a policy designed to catch the rare case where it would not be beneficial. Another reason defendants don't provide their briefs is merely because they believe it will permit them to lay out their case to the mediator without creating unnecessary antagonism from an injured plaintiff, who might be unfamiliar with the process.

One of the most important aspects of a mediation brief is to educate the insurance adjusters, risk managers, corporate officers or other persons who are responsible for making the settlement decisions. These decisions are most often made before the parties arrive at a mediation. Insurers commonly claim-committee the case. The more information a plaintiff can provide in advance of those decisions, the better chance s/he has of affecting that claim committee or other pre-mediation evaluation. In fact, sometimes, unbeknown to the plaintiff, defense counsel agrees with plaintiff's assessment and can use the help of plaintiff's brief to convince the client to authorize more authority.

Many attorneys will provide an extensive brief long in advance of the mediation. These briefs are not written for the benefit of opposing counsel. They are written so that the responsible decisions makers will have plaintiff's case in black and white long in advance of the mediation, permitting them to fully evaluate the case. In fact, the brief could just as well be addressed, "Dear claims handler, Here is my case." The more educated both sides are, the higher your chances of settling.

Finally, it is all too common that a party goes into a mediation and simply does not know or appreciate where an opposing party is coming from. Often, I read briefs from one side or the other and realize that the opposing party does not appreciate where the other side is coming from or how strongly they feel about the case. The case can't settle until they do. So, I often contact the part(ies) and ask that they consider disclosing their brief.

It is true, that there are occasions where it is better to keep the brief confidential. For a variety of reasons, you may not wish the other side to appreciate how you are approaching the case. But, if that is the case, the chances of settling the case at mediation are significantly reduced. There are many reasons to "surprise" the opposition at trial. But it obviously dampens prospects for settlement at mediation. There are

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also occasions where your theories are just developing, you don't want to put your case out there without further investigation, your case is simply not that strong, or you may just not be ready or prepared. All are good reasons.

A reason that is not a good one is that the brief contains confidential information. There is a simple solution to that. If there is confidential information you do not want to be disclosed to the other side, simply leave it out of the brief and provide the mediator with a confidential supplemental letter or brief.

The other problem with a confidential brief is that you will need to make clear to the mediator what is really confidential and what is not. My practice on confidentiality is strict. If a party tells me something is confidential, it doesn't go to the other side unless (1) I think it would be helpful and (2) the party gives me permission. However, when the entire brief is confidential, it is impossible to know what in particular (if anything) is actually confidential.

That mediation was a waste of time!

How often have you said that? Most of the time, it wasn't actually a waste of time. It was disappointing that the case did not settle that day. However, in all likelihood, the case had to go through that negotiating process in order to eventually settle. In other words, it was likely never going to settle the first time around. It is just the nature of the beast in that particular case. It is, of course, much more common in early mediation. Parties sometimes arrive at mediation where one side, the other side or both sides simply have not adopted a realistic approach to settlement and only time will solve that problem. That pre-settlement joust has now taken place, setting up the chance of settling it later. If the parties had not engaged in the process then, it is likely that they would have had to go through a "no-settlement" mediation at a later time instead.

Think two or three steps ahead in negotiations

For better or worse, the way settlement negotiations have evolved is that, in most instances the plaintiff makes a demand and the defendant(s) then make an offer. Selecting an opening demand is an art, not a science. Even more artful is moving from a high demand to a "reasonable demand." There are many mediation moves which can help facilitate that. When I first started practicing, a very good defense attorney once told me, "The farther a plaintiff's demand drops, the farther the demand is going to drop." That is still often true today.

When selecting an opening demand, counsel then needs to balance the high demand with consideration of how to climb down from that demand if need be. To the extent the demand is far above a reasonable number, the greater the "freefall" ahead.

As such, the artful negotiator is thinking two to three moves ahead. Moreover, it is not usually the opening demand that is the key move. It is the second, third or fourth move that is the decision-maker. High demands evoke tiny offers. Here are common phrases that are often uttered but generally unproductive:

Plaintiff: "We moved $1 million and the defense only moved $50,000"

Defense: "We doubled our prior offer and the plaintiff only moved down 10%"

Plaintiff: "I am not bidding against myself"

Defense: "I am not bidding against myself."

The reality is that the plaintiff in the first statement could have dropped $11 million if he/she had started $10 million higher. Same goes for the defendant. It could have moved 500% if its original offer was absurdly low. Neither statement is particularly relevant. And "bidding against oneself" is an ancient relic. The question is, do you want to "bid" or leave without a settlement? Often this problem is solved by one side making a small move and thereby permitting the other side to make a more significant move without having to say that it was bidding against itself.

After each side maintains its "extreme" position, it is time to wrangle the parties into more constructive negotiations. More often than not, the plaintiff has to make the first move that brings settlement into a more realistic range. The fear, of course, is that there will not be a response in kind. That is when the rubber meets the road. It is easy to make high demands. Not so easy to come down from them. Good negotiators and good mediators will help solve that problem together given the dynamics of the mediation.

Conclusion

These are some ways you can help the mediator help you. Consider the most effective and efficient way to communicate your case to the mediator through the timing, length and efficiency of your brief. Give the decision makers on the other side the opportunity to assess the strength of your case and provide you with their responses. Numbering and highlighting the exhibits is the most effective way for a mediator to review a lot of exhibits. Thinking two to three steps ahead in the negotiation process will mitigate the effect of high demands or lowball offers.


Levinson

For over 30 years, Arnie Levinson has assisted over 1,000 clients in coming to resolution. He has been routinely involved in shaping state and national legislation in insurance law. He was a founding partner at Pillsbury & Levinson, *leaving after 20 years to bring his skills to the field of mediation. He has been a member of ABOTA; served as President of the San Francisco Trial Lawyers Association; and is a three-time recipient of the Presidential Award of Merit from Consumer Attorneys of California.*

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