Insights From the Mediator's Perspective

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Introduction

In order to get the best possible outcome at mediation, it is critical to recognize that mediation preparation is no less important than deposition, hearing and trial preparation. The more preparation time spent with the client and educating the mediator in advance of the session, the greater the chance for success. This article explores mediator insights to provide another perspective on all aspects of the mediation process.

Preparation Of Client

Lawyers should not lose sight of the fact that even though they are fluent with the mediation process, the concept is new to the client. That is why ample time should be spent with the client prior to the mediation to fully explain the process. The client's true goals and expectations need to be covered before the mediation begins. More specifically, a settlement range may be helpful to explore.

The preparation of your client should include explaining the purpose of the general session and the caucuses that will occur throughout the process. Your client should understand that the general session is not adversarial: you do not want to polarize the parties. The client needs to know that the caucus is the appropriate place to freely speak to the mediator in confidence. Alert the client that the caucus setting is where the mediator will be "reality testing" the case to emphasize the weaknesses of the case and risks of trial. Reality testing includes going through the factual and legal issues to point out potential pitfalls if the case is tried. It may be helpful to bring case law and settlement data to the mediation to share with your own client, the mediator and opposing counsel. Be sure to include the cases that support the other side’s position.

Tapping Into The Mediator's Role

Use the mediator to your full advantage. Keep in mind that you have been living and breathing your cases for months or years. The mediator brings a fresh pair of eyes and ears to the case.

Mediators are permitted to confer with the lawyer and/or client on a confidential basis before, during and after the mediation. Apprising the mediator of the obstacles to resolution is extremely helpful in obtaining a successful outcome at mediation. Difficult clients or attorneys are common obstacles. Although the mediator is apt to realize the problem during the mediation, it behooves you to disclose the information upfront. It may assist the mediator in determining the best strategies to employ.

Position Statements And Pre-Mediation Calls

Pre-mediation statements are extremely helpful to mediators. Such statements are usually confidential, but some mediators prefer that copies be sent to all parties. One benefit of a statement is that it can streamline the issues before the mediation. It also tends to alert the mediator to potential obstacles to settlement. In the position statement it is helpful to have a summary of the legal and factual issues, history of settlement negotiations, potential barriers to settlement and status of case. The statement should address the issues that cannot be ascertained by reviewing the pleadings and discovery. Rather than sending the mediator a stack of deposition transcripts, highlight or flag the key portions. One caution: do not send only selected pages as that may suggest to the mediator that harmful portions to your case have been omitted. Be judicious in your selection of what to send the mediator. The mediator does not need your entire file. Plus, you do not want your client to have to incur additional expenses.

Consider having a pre-mediation confidential call with the mediator. A call can be a substitute for the statement or an addition to it. Since a pre-mediation statement will often be sent to your client, a call will provide a way to communicate some sensitive information that you prefer not to say in front of your client. For example, a client may have unrealistic expectations. A call can also be a more affordable way to prepare the mediator since it eliminates the time spent to prepare the mediation statement and reduces the time the mediator has to spend reviewing it.

Who Should Attend The Mediation?

Be sure to advise the mediator ahead of time of all the people attending on your side. When there is insurance, it is best for the adjuster to attend in person. If there is no insurance the true decision maker needs to attend. Many times a party will indicate they will have a decision maker in person, yet the person who attends does not have full authority to settle the case. Sometimes an employer will send an HR representative rather than in-house counsel or instead of a person with full settlement authority. From a mediator's perspective (and opposing counsel's viewpoint) it is difficult to negotiate without the true decision maker physically present. A decision maker who appears by telephone is unable to fully evaluate the other side through their own eyes. He may miss out on the dynamics of the proceedings. Remember that the decision maker is not necessarily the one who holds the purse strings, but could be a spouse, parent, etc.

General Session Approach

Remember your audience. Many attorneys present their case as if the mediator is the audience. The true audience is the opposing party, not opposing counsel and not the mediator. This is your best opportunity to have a direct conversation with the decision maker, and may be the first time the opposing party gets to hear from you and meet you. Avoid making an opening statement that sounds like a closing argument to a jury. Being adversarial only serves to polarize the parties.

Give careful consideration as to who is present during the general session. In some cases the decision maker may be the party against whom the claim is being made. For example, in a sexual harassment case, the alleged perpetrator may be the decision maker for settlement purposes. Since all the parties have the right to be present in the joint session it is imperative that the mediator be aware of the dynamics.

There are times when skipping a general session may be the most productive way to mediate but do not summarily dismiss it. There can be great value to having everyone together at some point in the process. It is a unique part of the mediation process and it serves a valuable purpose. Certain parties need that platform to feel they have had their “day in court.”

Value Of Visual Aids

Visual aids can often communicate a point more effectively than words alone. Use of visual aids may show the other side that you are prepared for trial, which lends credibility to your case. Be sure that if you are using PowerPoint that you do not just read the presentation rather than making direct eye contact with the decision maker. It is critical that you see the reaction to the presentation through facial expressions and body language. A very persuasive visual to use in mediation is a video clip. A snippet from a video deposition of a key witness can be effective to demonstrate how someone presents. Another effective visual aid is a folder with a few key documents to provide to all attendees e.g. witness statements, affidavits, deposition excerpts, case law, and the like.

Client's Role

If you have properly prepared for mediation, your client should be prepped to speak during the general session. Lawyers sometimes make the mistake of instructing their clients not to make any statements. The message this tactic may communicate to the mediator and the opposing side is that your client does not make a good witness. Some of the most powerful presentations have come from clients, not the lawyers.

In one employment case that I mediated, the plaintiff was extremely articulate, well-versed on the factual issues, and able to share the human side of the case without being overly emotional. The presentation was extremely powerful to the mediator and the defendant. There are certainly instances where a client may not be as articulate or impressive, and in those instances it may be best not to have them speak in the general session. But even clients who are not especially articulate may want an opportunity to be heard. Such clients can be effective in a limited speaking role, if adequately prepared. Mediation is a chance to vent directly to the other side. On the other hand, if the parties have not yet been deposed, one must decide if the preview would be beneficial.

Caucus

Allow the mediator to speak directly to your client. It is important for your client to build a rapport with the mediator so when the time comes for the mediator to reality test your client it will be an effective process. There are many opportunities in the caucuses to use the mediator to help brainstorm some solutions and approaches to reach a settlement. There are some parties who leave the mediator in the room while they negotiate the next move while others ask the mediator to leave the room. You may want to consider having the mediator's insight on the various offers and demands. The mediator may have some helpful knowledge having been in both rooms.

Settlement Agreement Or Term Sheet

There are mixed views regarding how to memorialize a mediation agreement. Some prefer to prepare a term sheet while others want to finalize a full settlement agreement and release. It is best to decide in advance how the settlement will be handled at the end of the mediation. Consider discussing the settlement provisions you will request if the case resolves at the mediation at the outset of the mediation or even before the mediation takes place. You may want to bring a flash drive with a proposed settlement agreement. For example, if your client is going to request a confidentiality provision with liquidated damages it is beneficial to discuss it in advance. Everyone is familiar with reaching an agreement after a long day (and possibly night) of mediation only to end up having to negotiate terms that had not previously been raised. Another important issue is the tax treatment of the settlement. While the lawyers do not serve as tax advisors to their clients, there is information that can be discussed before the mediation regarding the potential tax implications.

Conclusion

Adopting some of these insights may enable you to more effectively use the mediation process and increase your chance of successfully resolving your case at mediation.

About the Author

Ellen Malow is president of Malow Mediation & Arbitration, Inc., an alternative dispute resolution company located in Atlanta. Ellen was a trial attorney for over 12 years before beginning her ADR practice over twelve years ago. As a trial attorney she represented both plaintiffs and defendants in cases that included employment matters as well as business, medical malpractice, products liability, and toxic torts. She mediates and arbitrates in all areas of law, including employment, business, tort, construction, and domestic matters.

Ellen obtained her B.A. in Psychology as well as her law degree at the University of Texas at Austin. Ellen is a registered mediator with the Georgia Office of Dispute Resolution. She received advanced ADR training at the Straus Institute at Pepperdine University. Ellen has published articles and spoken for a variety of groups on a wide

range of topics. She has also given several radio interviews and is a member of numerous professional organizations.