How To Get The Most Out Of Your Next Mediation…

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Understand that mediation is a process. While mediation is a facilitated negotiation, you don't start negotiating as soon as you sit down at the table. Mediation is a process and it has its own unique steps that must be followed in order for the process to work. It is not unusual for the mediation to be the first time party representatives and/or attorneys and/or insurance representatives have met face-to-face. It is also not unusual for disputants to have had no settlement negotiations before coming to mediation. Many times, disputants have not spoken since the dispute-triggering event. While the purpose of the mediation is to explore and hopefully achieve a negotiated resolution, *before* negotiations can begin, the participants needs to first spend some time settling in and engaging in dialogue aimed at developing a broader view and understanding of "the problem" so that it encompasses both/all sides' views. Bottom Line: Go to mediation prepared to talk about the problem and possible frameworks for settlement before the exchange of offers regarding specific settlement terms and conditions.

Understand the role of the mediator. The mediator is an impartial third-party who has no stake in the outcome. He/she is a neutral third-party who does not favor one party over another – literally, friend to all, but ally of no one. The mediator's primary roles are: 1. *Shepherd*, responsible for managing the process in a fair and even-handed way; 2. *Facilitator*, responsible for helping the parties engage in constructive dialogue about the problem and their settlement options; 3. *Messenger*, responsible for carrying messages and information between the parties when they are uncomfortable speaking directly; 4. *Agent of Reality*, responsible for putting objective criteria and reality factors on the table and helping the parties recognize unrealistic goals or unobtainable settlement options; 5. *Coach*, responsible for helping the parties utilize the process effectively and encouraging them to stay at the table and not quit prematurely; and 6. *Innovator*, responsible for making constructive suggestions and helping the parties engage in creative, "outside-the-box" thinking.

Understand that mediation is not litigation. Most parties come to mediation after a lawsuit has been filed and a certain amount of activity has occurred in connection with prosecuting or defending the lawsuit. Mediation and litigation are very different processes. In court, you play to the judge/jury, looking to impress and persuade them to rule your way.. In mediation, the parties play to each other, trying to reach each other with their respective messages and persuade the other to see things differently and to voluntarily give them what they want or need or perceive is their due. In court, there are strict rules and procedures governing how and when you advocate.

For the most part, attorneys are tasked with advocating while their clients sit silent. In mediation, the parties play a much more active role, and thus need to be prepared to participate and decision-make so as to not become frustrated or upset or fatigued. In court, the focus is on the past and historical events that cannot be changed are revisited time and time again. In mediation, the focus is on the present and seeks to move the parties forward by bringing a definite close to a past event. In court, the law is used to name, blame and claim and is the basis upon which "relief" is awarded or denied. In mediation, the law is but one of many aspects of the dispute to be talked about and does not limit the parties' settlement options. Parties can and frequently do agree on a negotiated outcome that differs from the "legal relief" available to them through the courts.

Talk to the mediator in advance of the mediation. Once you've selected the mediator, give him or her call. A phone conversation is an efficient and economic way to get information to the mediator about: 1. the nature of the dispute; 2. any settlement offers or efforts that have been made and your perspective on why settlement was not achieved; 3. what your client wants or needs in the way of a settlement; 4. any special dynamics about the relationship of the parties or your relationship with opposing counsel (good or bad); 5. any timing issues; and 6. any special needs or circumstances that the mediator should be aware of in advance of the mediation. It is also an efficient and economic way for the mediator to get information to you about what he or she needs to prepare. A pre-mediation telephone conversation also provides you with an opportunity to discuss such things as whether the mediation should start in joint session or private caucus; whether it would be helpful (or not) to have the parties make joint presentations; what items should be on the opening agenda for discussion; what documents or other items should be brought to the mediation or provided to the mediator in advance; etc. Taking a moment to talk to the mediator in advance of the mediation serves to accelerate "getting down to business" once the mediation begins and limits the need for him or her to spend session time taking an oral history from the parties in order to get his or her hands around the dispute.

Be prepared to explain your side of the dispute and how you think it can/should be resolved. It advances the mediation process considerably if the parties and their counsel are prepared to explain their side of the dispute and articulate ways in which they think a resolution can be structured or talked about; *provided*, that these statements strike a balance between passion and diplomacy. Focus on the key facts, especially those that are not disputed. Prioritize your client's settlement objectives and make sure they tie to reasons and bear a reasonable relationship to what the court or marketplace alternative is. Strive for a balanced presentation and be prepared to express yourself clearly *and* in a manner that the other side will be comfortable listening to your presentation. Most people have trouble *hearing* if they are yelled at, pointed at, insulted, ridiculed or otherwise presented with aggressive tone, words, gestures or conduct.

Be prepared to listen to the other side. Conversations are two-way events. So the other parties will need to be given an opportunity to explain their side of the dispute and how they think it can/should be resolved, and you and your client need to be prepared to listen and respond. Being able to generate a response shows that you listened. This means listening to the "bad facts" of your case and differing views about the evidence and/or applicable law. To prepare yourself for the "listening" aspects of mediation, it may be helpful to review (in advance of the mediation) areas of the case that may not be viewed favorably by the opposition so that neither you nor your client are not surprised by remarks that may be made by the other side and are better able to hear them out … and then respond.

Understand the difference between interests and needs, on the one hand, and litigation positions, on the other. A successful mediation resolves a dispute by finding a solution that best meets the parties' individual and joint interests. Frequently, those interests are defined in the present tense (where the parties are) or the future tense (where the parties want to be) and bear little resemblance to where the parties were (past tense) when the transactions or events occurred that led to the dispute. Parties frequently focus on the monetary recovery to be achieved or avoided based upon legal positions that have been taken in the case. One of the interests to be satisfied might be monetary, but there may be other interests of equal or greater

value. If you come to the mediation prepared to expand your discussions beyond the legal issues and litigation positions taken so as to include discussion about each party's interests and needs, by that act alone you will significantly increase the chances of achieving a settlement.

Look for common interests. In advance of the mediation, it is important for the parties to identify their own interests and needs and to appreciate/anticipate that the other side may have interests or needs that underlie their positions. Sometimes, the parties have a common interest: e.g., to maintain, improve or restart a favorable relationship; to address a timing exigency; to co-exist in a shared community or industry; to spend dispute resolution dollars wisely so that the cost of the process does not exceed the amount in issue; to do other things with their time, money and resources. If such circumstances exist, it is important to identify them because common interests provide a convenient starting point for negotiations.

Put yourself in the other party's shoes. It is helpful if the parties (in advance of the mediation) go through the exercise of putting themselves in the other party's shoes, considering how the other party may perceive not only the dispute but your view of how the dispute should be resolved. Keeping in mind that any settlement must be *mutually acceptable*, there needs to be something of value/importance for the other side if there is to be an *amicable* resolution of the dispute.

Be prepared to discuss your "best case" and "worst case" alternatives to a possible settlement. Evaluating settlement options that may be presented in mediation are predicated, at least in part, on comparing those options with your "best" and "worst" alternative to a negotiated agreement - also referred to as BATNA and WATNA. In the context of the litigated dispute, the parties' alternative is to go to court for an adjudication of the dispute. Things to think about when doing a BATNA/WATNA analysis include: 1. How long will it take to get to judgment? 2. How much will it cost to get to judgment? 3. What is the "best outcome" likely to be achieved in court and what are the odds that such an outcome can/will be achieved? 4. What is the "worst outcome" that could occur in court and what are the odds that such an outcome can/will occur? 5. If the client is the plaintiff or cross-complainant, are there sufficient assets and/or insurance to pay the judgment in full?

Articulate your settlement goals and come prepared to make in-game adjustments. Unlike litigation where the judge decides the outcome, and that outcome is forced upon the parties whether they like it or not, in mediation the parties decide whether or not they want to make a deal (or not). The mediator can help define and refine settlement goals, but the mediator is not there to tell either side what to do. It will advance the process considerably if you think about your settlement objectives *and* tie them to reasons why you believe your proposed terms are reasonable under the facts and circumstances of the case, present circumstances, expressed interests or needs, etc. It will also advance the process if you have someone in attendance who is capable of making – and has the authority to make – in-game adjustments to the pre-agreed settlement negotiation plan and objectives. It is the rare case where disputants' pre-defined settlement goals overlap. The contrary is true. There usually is a gap between both/all sides' pre-defined reservation (final offer) points. The number one reason intractable impasse occurs is one or both or all sides is missing the decision maker who has the power to say "yes" to a change of plans, but sending someone who only as authority to say "yes" within a predefined range means that when that party says and stands by "no," the negotiation is over and the litigation is back on track as everyone's alternative. Bottom Line: If you're serious about trying to get a settlement done at the mediation, bring someone to the mediation who has authority to react and respond to that which has occurred at the mediation that might warrant and adjustment to a pre-defined settlement plan.

Reality check. One of the byproducts of litigation is that each party's vision of the dispute may become exaggerated or distorted in some way and, correspondingly, the parties' expectations about what is a "reasonable" outcome may become exaggerated to the point of being unrealistic. Something has to give in order for the parties to resolve the litigated dispute. Mediation provides an opportunity for parties to get a reality check, but that can happen only if they have enough information to make that analysis and adjustment on their own terms. In advance of the mediation, it is important for the parties to consider whether all or some part of the dis-

pute is based upon a perception or assumption that has not been verified. If so, consideration should be given as to whether the mediation provides an opportunity for the parties to have a constructive dialogue about information gathering and exchange. For example, where one party *believes* property to be worth "X" and the other party *believes* the property to be worth "Y," but neither one has tested their assumptions, it might be worthwhile for the parties to share in the expense of a non-binding appraisal for use in connection with the mediation. For another example, where one party *believes* that the other party has diverted loan funds from their intended purpose and the other side says "not," but no one has yet looked at the bank records, this is an exercise that probably has to be gone through (formally or informally) before the parties can have a meaningful settlement discussion.

Is this the right time to mediate? Another byproduct of litigation is that some or all of a party's claims or defenses may be disposed of through a pretrial motion. (E.g., motion to dismiss; motion for summary judgment; etc.) When a party has filed (or is planning to file) a *dispositive* motion, the parties may need to wait until after the dispositive motion is heard and decided before going to mediation, unless there is some external circumstance that militates in favor of mediation (e.g., a merger and acquisition opportunity, a fluctuating marketplace, a desire to avoid adverse publicity). While a dispositive motion and response certainly help frame and present each side's view of the case, those pleadings can also serve to harden each side's resolve to maintain their stated positions, making it more difficult for the parties and their counsel to move off of their stated positions.

The first number is not the last or final number. Parties looking for a negotiated outcome want to strike a "good" bargain - meaning, they don't want to over pay or settle too cheap. Everyone needs to feel like they got a "good deal." So, there need to be a *series* of offers and counter-offers. Only when someone has over-valued the other party's case or undervalued their own do the parties find themselves in an overlap situation where the first party's offer is better than what the other party hoped to achieve. *This is a rare event!* The better course of action is to plan on making several "moves" before reaching a "final" number that both/all parties can and will agree to.

Mediating in the "Red Zone." The "red zone" is a football term that refers to the last 20 yards a team has to cover in order to score a touchdown. In mediation, the "red zone" refers to the last set of moves the parties need to make in order to achieve a negotiated resolution. By this point in the mediation, parties have moved off of their pre-mediation positions and narrowed the gap between their settlement positions considerably and may be experiencing fatigue mentally, physically or both. However, having made it into the "red zone," the last thing the parties should do is give up. There is usually a move or two left that will get the deal done. The parties may not leave the mediation with what they want, but they may leave with what they really need and with the best deal available in terms of what there is to work with at that moment in time.

It takes two to tango. Mediation is not so much about finding truth or justice as it is about searching for options and crafting solutions. As you prepare for mediation, it is helpful to remember that the dispute can only be settled when *everyone agrees*. When parties are in disagreement over the facts, applicable law, credibility of evidence, how the court should rule, etc., some level of persuasive conversation, negotiation and compromise must occur in order for the parties to navigate around these obstacles. Parties can agree to disagree about the merits of the dispute, but nevertheless find a way to talk about and negotiate terms for a settlement. However, that progress cannot be made if one party issues an ultimatum: "take it or leave it" or "that's my first and final offer." The ultimatum is a power play tactic that communicates the following message: "I'm going to dictate the terms of this deal." Settlements are contracts, contracts must be consensual, and consent must be given voluntarily. Mediation doesn't change that. In fact, mediation reinforces the notion of mutuality and voluntary/informed choice in defining the terms and conditions for settlement.

Keep the "3 C's" of mediation in mind. A common ingredient found in all successful mediations is courtesy, cooperation and compromise. Come to the mediation prepared to abide by the 3 C's and your next mediation will move more quickly and smoothly. If your mediation stalls, consider whether one of the key ingredients is missing.