PULLMAN &COMLEY

10 Tips For a Successful Mediation

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Imagine the following conversation between lawyer and client following a judicial settlement conference:

Counsel: “The judge says we should go to mediation.”

Client: “Sounds good. My doctor says meditation will reduce my blood pressure.”

Counsel: “The judge says we should also think about arbitration.”

Client: “Perfect. My kids say you can make a lot of money in arbitrage.”

For those of us (lawyers, judges, retired judges) who spend our days trying to resolve cases, the idea of mediation as an alternative to litigation is by now ingrained not only in our legal vocabulary but also in our case evaluation DNA. For better or for worse, the consistent focus by the judicial system on alternative dispute resolution processes has made the consideration by counsel of mediation and arbitration an essential element of the civil trial process.

Given the ubiquity of mediation as a preferred method for resolving cases, how do counsel, and mediators themselves, ensure that a mediation is conducted in a manner designed to increase the likelihood of its success?

If counsel and client conclude that mediation is an appropriate method of resolving their dispute there are a number of basic planning and organizational steps that will enhance the possibility that both client and counsel will view the process as fair and reasonable. Many of these suggestions are basic and self-evident, but as I was reminded on my first day as a practicing attorney in 1978, “It is the obvious and the simple that are keys to success.”

1. **Identify Your Goals**

In virtually every case, counsel and client’s principal goal is to resolve the case on the most favorable terms possible in light of the strengths and weaknesses of the case. But, there may be secondary objectives, that if achieved, will render the mediation a success even if a final settlement is not achieved. For example, while the case might not settle on the day of the ADR meeting, it may provide the context for future discussions and resolution. Equally important, it may provide an opportunity for the client—and counsel—to obtain a better perspective on the challenges the client will face if the case is not resolved. An effective mediator should be

able to assist counsel in explaining to the client the range of settlement options that are realistically available, the range of predicted outcomes if the case is not settled and the range of settlement available in the mediation context.

2. Design a Process That Works for You and Your Client

Most of us are accustomed to the traditional bilateral mediation with the neutral serving as a shuttle between the parties. In many cases, especially the garden variety personal injury matters, this process works well. In more complex cases, such as mass torts or multi-party business disputes, the process may have to be customized to address the challenges of the particular case. In two multi-plaintiff, complex cases I mediated in my last couple of years on the bench, it was essential that the process be segmented, first to assemble the funds necessary to resolve the many claims. Second, because of the physical and emotional devastation suffered by the plaintiffs, it was also critical that each plaintiff have an opportunity to be heard. As a result before substantive settlement discussions even began, hundreds of hours were spent meeting personally with the victims and also with the insurance carriers and defendants.

3. Recognize You Have Multiple Audiences With Different Objectives

In planning a successful mediation it is useful to remember that your client, opposing counsel, opposing party and the mediator likely have different objectives and perspectives and that an effective presentation requires consideration of those different interests. With respect to the opposing side—counsel, adjuster, or party—the goals typically are to persuade, expose their risk and reshape their view of their case and yours. With respect to the mediator the goals usually are to establish a good rapport, demonstrate credibility, persuade the neutral of the strength of your case and perhaps obtain assistance in engaging the client. And with respect to the client, the goal is to optimize the outcome, manage expectations and instill his or her confidence in you. These goals are not always mutually consistent; counsel's job is to effectively integrate the interests of all three audiences into his ADR advocacy.

4. Remember that How You Do It Is as Important as What You Do.

Remember, mediation is not a trial. Subject to the variances due to case complexity, very little is gained, and much might be lost, if the approach is to litigate the case during the mediation session. The goal is to reach a compromise, not establish victory. The mediator is not going to grant summary judgment or rule on a motion to preclude. Style and approach are important. Pounding the table, threatening to walk out or insisting on total capitulation are unlikely to "move the needle." What *is* effective? The understated and artful concession, firm, but gentle advocacy and above all, preparation, preparation and more preparation. The law and the facts do make a difference in mediations as they do at trial and they should be at the fingertips of every attorney attending a mediation.

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5. Be Realistic and Be Flexible

All cases—the best and the worst—have a settlement value. All cases have strengths and weaknesses. Having blinders on regarding either can cause a distortion in the settlement process. The challenge is to identify the range in which parties can reasonably agree settlement should occur. In some matters, that will involve substantially more money than the defendant initially estimated. In others it may mean substantially less than the plaintiff anticipated receiving. In all cases, however, it is important to be receptive to the views of opposing counsel and the mediator. Rigid adherence to an initial settlement offer or demand based on a preliminary internal valuation can sidetrack or even derail the settlement discussions. Demands such as "unless $100,000 is offered" or "unless the demand is reduced to below $500,000" are unlikely to generate a positive response.

6. Be Patient

There is something about the settlement process that often seems to preclude substantial movement toward a resolution until late in the session. For many, the glacial pace of offer and demand can be frustrating. Experience shows, however, that if the parties remain committed to the process and willing to engage in the give and take required for productive discussions a settlement will almost always result. As one wise mediator once shared with me, " If the parties keep talking something good is bound to happen."

7. Listen Carefully

My colleague's father, a distinguished attorney in his own right, often repeated a Yiddish proverb, which roughly translated, states, "God gave us two ears and only one mouth for a reason." Listen to what opposing counsel has to say, listen to what the mediator suggests and listen to what your client is telling you. Some of us are blunt; others like to speak in code. Either way, valuable intelligence and insight can be gathered by listening patiently and intently. Posturing, rhetorical excess and insistent language all have their place in the negotiation process, but there is no substitute for listening carefully to the messages, subtle or blunt, that are exchanged during the mediation process.

8. Understand the Other Side's Problems and Concerns

The rhetorical observation, "You think you've got problems? Listen to mine!" can serve as a guiding light for all of us. Client control, unreasonable expectations, or a difficult adjuster are but a few of the more frequent challenges that are faced in the settlement process. A little flexibility and a modest concession can often be the key that unlocks a settlement. A plaintiff who is willing to accept $990,000 instead of $1M or the defendant who is willing to offer $100,000 instead of $90,000 are frequently instrumental in resolving a challenging case.

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9. Be Creative

All of us are understandably hostage to habit and custom. Mediations are often conducted in the same manner. But what happens when the tried and true is not working? Think about different approaches. Not infrequently, especially in business and construction disputes, allowing the principals to speak directly with each other outside the presence of their counsel can be highly productive. So too, in cases involving scientific expert testimony, allowing the opposing experts to confer can narrow the issues or create a solution that neither the parties, counsel or the mediator had considered.

10. It's OK to Have Fun

Litigation, mediation and arbitration can all be stressful. Dealing with client expectations, competing time demands and the position of the opposing side can create tension and stress. If you are going to spend six or eight hours, or even days, in settlement discussions, it's helpful to work in as relaxed an atmosphere as possible. A little good humor and cheer can go a long way to enhancing discussions and promoting settlement.

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