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Notes From the Judge: Keys to a Successful Mediation

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Almost eight years ago I authored an article titled "10 Tips for a Successful Mediation," and here we are more than 1,000 mediations and arbitrations later. I thought now would be a good time to revisit that topic based on lessons learned and trends discerned after spending countless hours with counsel, clients and corporate representatives resolving commercial, personal injury, insurance, environmental and estate disputes. These suggestions are shared against the backdrop of the COVID-19 pandemic and its impact on the courts and current settlement practices.

As we all recognize, the consistent focus by the state and federal judicial systems on alternative dispute resolution processes has made mediation an essential element of the civil trial process. Indeed, it is not an exaggeration to observe that with civil jury trials largely on hold for the foreseeable future, ADR is almost the only game in town for resolving disputes.

Once 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 the mediation is successful. While many of the fundamentals still hold true, I'd like to offer some additional insights based on what we've seen over the years, and the last year in particular.

1. Identify and Refine 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 ultimately successful even if a settlement is not achieved on the day of the mediation. For example, counsel may obtain valuable insight into factual and legal challenges that will be raised, issues with the client's credibility, or potential settlement values that will provide the pathway for successful follow-up discussions.

If a case does not resolve at the first mediation session, I often suggest "homework assignments" for each party, recommending they obtain additional information, revised settlement authority or additional legal analysis. They would then report back to me by an agreed-upon date so discussions can continue either by phone, email or video chat. In today's new reality created by COVID-19, where communication among counsel and their clients is not always as efficient as it was pre-pandemic, it is not unusual to require significant additional follow-up to reach a settlement.

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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. With the pandemic forcing most mediations online, however, we've had to redesign and modify our more traditional processes. For example, we customarily schedule pre-mediation "practice" sessions to assure the participants are fully comfortable with the technology. I often have individual pre-mediation calls with counsel and client to try to foster the rapport and understanding of the issues that previously would have been established via in-person meetings. It is important to recognize that online mediations often have the curious effect of making the process faster and more efficient while simultaneously making them more impersonal and antiseptic. Spending some time together ahead of the mediation can have a positive impact on the process.

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 even the mediator likely have different objectives and that an effective presentation requires the advocate to recognize and address 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 and the mediation process. These goals are not always mutually consistent; counsel's job is to effectively integrate the interests of all three audiences into his ADR advocacy, while the mediator has the important responsibility of being attentive to all of those interests.

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

Remember, mediation is a form of dispute resolution. It is not a trial. It is important to avoid the temptation to treat the mediation as a proxy for litigation. Online mediations, while hugely effective, are not a substitute or outlet for the pent-up demand that counsel or their clients may have for a trial. The goal is to reach a compromise, not establish victory. The mediator is not going to grant summary judgment, rule on a motion to preclude, or enter a verdict. 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? Understated and artful concession. Firm but gentle advocacy. Patience, persistence, flexibility 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.

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 that a 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 may 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.

In this era of COVID, it is especially important to be aware of the impact the pandemic may be having on settlement values. Especially in the world of personal injury, much discussion and speculation has centered on whether insurance carriers have modified their settlement posture since the pandemic arrived. Both plaintiffs and defendants should have a clear-eyed understanding of when their cases will be tried and the impact, both positive and negative, of trial delays.

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. Again, however, COVID and online mediations can distort the process. While the real-time nature of online mediations often speeds up the settlement process, the occasional unavailability of decision-makers due to remote work obligations can sometimes slow down the process of obtaining the additional approvals necessary to resolve a matter, frequently necessitating significant follow-up by the mediator.

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. 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 a mediation. We all know by now that online mediations are not perfect substitutes for the in-person dialogue, and up-close assessments are critical to successful mediations. For that very reason it is essential that our ears make up for what our eyes cannot always see.

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 decision-maker 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 $1 million or the defendant who is willing to offer $100,000 instead of $90,000 are frequently instrumental in resolving

a challenging case.

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. Frequently, 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 nor the mediator had considered. Counsel should never be afraid to ask the mediator for suggestions that might unlock an impasse. Likewise, the mediator should always invite suggestions of counsel.

10. It's OK to Have Fun
Litigation, mediation and arbitration can all be stressful, especially as we navigate the personal and professional challenges of a pandemic. 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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