PREPARATION v. IMPROVISATION
THE PATH TO MEDIATION SUCCESS

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PART I

WHY MEDIATION, WHEN TO SCHEDULE AND SELECTION OF APPROPRIATE MEDIATOR

Mediators have the unique opportunity to observe a variety of different approaches to negotiation and mediation advocacy. While parties have indeed settled during the process, the approach taken either enhanced or detracted from the ultimate outcomes.

While sound and complete preparation is the cornerstone of any successful negotiation, this topic will focus on when ADR/Mediation is appropriate, strategy tips to use during the actual mediation itself and exploring other options to break the impasse. These are basic negotiation techniques that are applicable in any negotiation venue, but this topic is geared towards a mediation environment. One basic caveat to keep in mind throughout is that everything you do and everything you say brings you closer to or further from your goal. There are no neutral actions; each is either building on or taking away from your desired outcome and each further action needs to be measured in that context.

I. <u>Why Have We Gotten to Mediation?</u>

- Perhaps the most important question to ask
- Initially, it is important to identify settlement barriers – ask why the case has not already settled

1. This question can provide insight into the approach you may want to take at mediation and how much client participation would be beneficial

2. If the other party has unrealistic goals, your client may be able to tell his story compellingly and convincingly and show the opposing client/attorney how their case is not as strong as they believed

3. If the opposing client has unmet non-monetary needs, perhaps they need more than just a dollar amount – they may want an apology

- Try and find what the true reason is for the dispute- is it personal?

- Ask some open-ended questions to try and make sure why your client is truly in the position he is in

II. When Should Mediation be Scheduled?

- When both sides have had an opportunity to evaluate their positions
- When you have educated yourself and your client about the process
- Before hiring trial experts
- Before taking expert trial depositions
- When both sides have flexibility
- When the clients are available (in person if possible)
- When demands and offers have been made.
- When the parties are faced with a deadline
- When parties realize that it is relatively inexpensive
- When you want to soften the opponent
- When the parties can agree on a mediator
- When the parties have considered their risks and costs
- When the parties seem to have a generally open mind
- When the parties agree on a cost factor
- When your client realizes that 90 percent of cases eventually settle
- When your client wants to have input to the result
- Never request mediation within two weeks after you've lost on any motion, no matter how insignificant

- Ask for mediation in a letter which accompanies a motion to compel discovery. Offer to postpone the motion if the other party agrees to mediation
- Where you have a belief in the merits of your case, send out a letter demanding mediation, and specify your good faith estimate of the value of the case. Indicate that you will only agree to mediation if the other party fully understands and acknowledges your approximated value. If you then show up at the mediation and the other party comes in substantially below that approximated value, leave promptly.

III. Choosing a Mediator

- This an important, yet often overlooked part of process.
- Mediation is more art than science.
- Even outstanding mediators will have different strengths, weaknesses, talents, specialties, styles, and approaches.
- Since disputes are driven by different factors, and mediators have different strengths and weaknesses, a more effective and appropriate mediator selection philosophy should be one that seeks to match the mediator's strengths with the true cause of the underlying conflict.
- Determine what the real problem is as to why settlement hasn't occurred.
- Tailor that to the mediator you select.
- In selecting a mediator, present the mediator with the situation and ask how they may approach it.
- After choosing a mediator, the parties should agree on how the mediation cost is to be allocated as well as where and when mediation will take place.

PART II

PREPARING FOR THE MEDIATION

Sound and complete preparation is the cornerstone of successful negotiations. Keep in mind throughout the mediation process is that everything you do and everything you say brings you closer to or further from your goal. There are no neutral actions: each is either building on or taking away from your desired outcome and each further action needs to be measured in that context.

Preparation of both your client, your opponent and conferring with the mediator will maximize your recovery.

Rule #1-no surprises! Provide your opponent what he/she needs to obtain adequate settlement authority. This includes a complete copy of all medicals, liens, CMS and wage loss information. A surefire way to torpedo a mediation is with a "drive by" dump of additional medicals the day before or at the mediation.

Rule #2- prepare your client and temper their expectations with reality. Mediation is a process-it takes time, and the client needs to be familiar with the process. Let them know the initial demand means nothing. The number at the end of the day is what counts.

Coordinating with the mediator is at the top of the list in any pre-mediation work. What does he/she need to know about this case? What do you need him/her to help with? The mediator should know of any unique dynamics about your case (e.g., influencers, I need to be heard).

More often than not I am questioned about the use of "position papers" or limited material in advance. Ask yourself "will the submission of information in advance be helpful to the mediation process?" If you do submit something in advance, consider a concise statement of the facts and identity of parties, any key legal issues, rarely given citations, a timeline, history of negotiations, identity of persons who will be present and their relationship to the litigation, a copy of the pre-trial order, settlement letters or key pleadings, identify the venue, and most importantly, identify the strengths and weaknesses of your case. To that end, preparing a few key exhibits, statements, deposition pages, key reports or special damage information is optimal. Lien information and a contact person (with authority) is a must.

Many attorneys tell their clients to remain silent at mediation. This can be a tactical and psychological mistake with an informed and articulate client. The client

may be the best person to outline the facts. They know their case the best and may be more credible than counsel. Further, the client's expression of a sincere desire to find a resolution, especially if coupled with an acknowledgment of his or her own distress and an expression of empathy with the distress of the opposing party can soften the settlement posture of the other side. Prepare your client to understand the process and to receive new information. Consider asking certain questions to your client regarding the dispute in order to get information which may be helpful in settling it. For example, ask them what their goals and objectives are, what they think the other party wants and why they might want it, three things they will be willing to do to settle the dispute and so forth.

As far as pre-mediation terms, the "gold standard" is to have a representative and/or the client present and with genuine settlement authority. Consider obtaining written confirmation in advance such as the case and get written confirmation of the name and title of the party attending the mediation. However, do realize that confirming authority in advance does not guarantee it will happen-often people say "yes" even though their authority is limited to what the higher authority executive has allowed.

Another factor to consider is to decide in advance who should participate in the caucusing in multi-party mediations. Your goal is to give the mediator something other than merely a number. Often times you may need to save information for later in the process (such as impeachment-do you save it for trial?). All attorneys must consider whether to present everything if your opponent is not serious.

PART III

A. OPENING STATEMENTS

The question everyone has is should you do an opening or waive it and "get down to business"?

The answer is -- it depends.

It depends on lots of things. If the case is a personal injury case and this is the one and only time the decision maker for the defendant insurer is going to see the injured party, it may help if the injured party can explain in her own words how the accident has affected her life. However, if either of the lawyers is unable to take off his litigator hat and insists on making a presentation to show the other side how they are going to destroy their opponent's case you may suggest to the mediator not to have opening or to restrict them to comments by the parties themselves and not counsel.

There are several goals you should have in mind for opening statements.

It is your chance to address and educate the other side.

It allows your client the opportunity to speak and feel like she is being heard. Many lawyers are reluctant to let their clients speak at the opening session. My experience is that is a mistake. In many cases a sincere statement by the client, whether a person injured in an accident, or an insurance adjuster are very effective and more meaningful than comments made by counsel.

You can gather information you may not have had before.

In many cases an opening allows a party to personalize themselves. They are no longer just a name in a cold court document. This is important for the defense representative as much as it is for the plaintiff. It allows her to directly tell the plaintiff something like this:

"Ms. Plaintiff, I have traveled a very long distance to attend this mediation because I want you to know that even though we have some disagreements about how this happened, we are sincerely sorry for the injury you have sustained, and I want to do all I reasonably can to resolve this matter to help you resume the life that you had."

In the right case the opening allows the lawyers to discuss the evidence they will be presenting at trial and to acknowledge that the other side will have answers

to some of those but on balance that it is his belief that he will be able to persuade a jury of the merits of his case. And then he could conclude with something like:

"It is my hope that none of us will have to spend the time and the money to present this at trial but rather hope we can resolve this today."

In certain kinds of cases, such as sexual harassment or discrimination a sincere honest apology for the harm that has been done and a commitment to do better can help to defuse the anger and disrespect a claimant has in these types of cases and can put the mediation on a road to success.[1]

An opening allows the parties to discuss what will happen if resolution is not achieved. (BATNA) You can point out to the other side what it is going to be like if no resolution is reached.

Openings should not be used to make a personal attack on the other side.

You are not going to persuade the other side that their position is wrong. You need to focus on the risks of going forward.

If you make an opening statement keep in mind that you are making it primarily for the other side's client and secondly for the mediator.

If possible, I try to encourage the advocates to preview their planned opening statements with me before the mediation. This is a great opportunity to try to get the advocate focused on things that work to set the stage for resolution.

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[1] Sarah Kellogg, The Art and Power of the Apology, Washington Lawyer (2007)

PART III

B. THE CAUCUS

Mediation theory generally accepts the concept that there will be a joint opening session with all the parties where the mediator makes procedural comments on how she intends to conduct the process, each party makes an opening statement and then the parties adjourn to caucus.

In practice many civil cases which are mediated where the parties have lawyer representatives the opening statement is eliminated. There are various views on whether this is a good practice or not but the focus here is being an effective advocate in caucus.

In the early caucus sessions, you can clarify questions the mediator might have about your case. These early sessions also allow the parties to express their anger, frustration and hurt. This is important because it provides the parties the opportunity to be heard.

Typically, the mediator will start with the plaintiff and if there is no history of settlement discussions the mediator will be looking for an opening settlement offer to get the process going. This is your opportunity to set the stage for settlement. My recommendation is always to give the mediator an offer that represents what could happen if the case is tried and everything went your way. The worst thing that can happen at this juncture is to present an offer that is outside the realm of what could happen. I have been in mediations where there have been previous discussions involving exchange of numbers and the plaintiff's counsel's first offer at mediation is a number that is higher than any number ever discussed. This is a non-starter. The other side will immediately view this as a "bad faith" offer and the mediation is likely poisoned at that point.

In the vast majority of attorney represented cases all sides have some idea of what the range of possible outcomes might be. Make the offers in that range and you will likely resolve your case.

One thing that you should do as soon as a mediator is selected is to call her and ask for a pre mediation meeting. Remember *ex parte* communications with a mediator are totally acceptable. This meeting should include a discussion of issues that you might not want to put in a mediation paper. This would include such things as client expectation problems, problems with the attorney for the other side, adjuster problems and the like. This is a good time to discuss your opinion on

whether there should be modifications to the opening session. This is the opportunity to give the mediator advanced information before the mediation papers are submitted and will help the mediator in designing a session most likely to succeed.

In the caucus the mediator is going to ask you pointed questions which go to potential problems with your case. If you want to get the case resolved, be honest. Admit if you have proof problems, witnesses that a jury might not like, gaps in the liability. Be prepared to answer a question like this: “If you tried this case 10 times what do you think the outcome would be?” What the mediator is doing by asking this is making you and your client focus on reality.

Ultimately as the day progresses your goal should be to get closer and closer to the offers of the other side so that the mediator can use her skills to get to a final resolution that is acceptable to everyone. Use the mediator as your ally. You are looking for ways to resolve this case that are acceptable to your client. The mediator has received a lot of information from the other side. He should be able to help you with proposals that have a chance to succeed.

PART IV

OPENING OFFERS, DEMANDS, AGGRESSIVE V. ABSURB, WHEN TO DIVULGE IMPEACHMENT EVIDENCE, REALITY TESTING, GETTING THE MEDIATOR TO HELP YOU.

Your presentation during the process of mediation involves balancing expectations with reality. Mediation is a process. Much of this will involve coordination with the mediator.

- What does he/she need to know about this case?
- What do you need help with (such as things reenforced from your client preparation)?
- Guidance, brainstorming, ideas, approaches
- Unique dynamics (e.g., influencers, a need to be heard)

Often times parties will want to tell the mediator their ultimate goal. That tactic is generally frowned upon. I say this as mediators may be told not to ask for anyone's bottom line because they are not going to be told the complete truth.

In terms of opening offers, be sure to send the message that you have in mind. If it is unusual, be sure that the mediator understands the message that you want to send. Ask yourself-what is heard about making a demand loosely or in a range? The opposition may interpret the range as a lack of confidence. Moreover, a desire to be reasonable may be misinterpreted. Some experienced claims personnel simply track the numbers and figure that everyone splits the difference.

Naked numbers (without rational) send mixed or inconsistent messages. Naked numbers may also appear to be arbitrary. Don't be afraid to make the first offer but make it wisely. Research shows that first offers come out ahead. It is also suggested that outcomes are affected by the first relevant numbers.

Numbers should be aggressive but not absurd. However, numbers clearly out of line may help in the emotional/psychological aspect. Such a number may allow your client to feel that he/she is being taken seriously and to get off some of the anger that he/she has. Then, once the client has calmed down or feels that they have stated what is just, then perhaps you can go forward with more reasonable numbers.

First relevant numbers have a strong anchoring effect. In the course of mediation, ongoing positions should signal your target price which should be better than your final number. Keep in mind that aggressive numbers are encouraged, and absurd positions are discouraged. I have often heard that absurd numbers out of the box are akin to eating garlic-the absurd number tends to linger and it takes time to overcome that position to get to more relevant numbers.

Assistance from the mediator is crucial. He/she has been retained to assist in negotiating a settlement. With that, the parties are encouraged to look to the mediator for assistance. Be prepared for questions from the mediator (also, be sure your client is prepared for such questions to be asked in order to get the most out of the process).

1. What is your best-case scenario?
2. What is your worst-case scenario?
3. What is the strongest part of your case?
4. What is the weakest part of your case?
5. What is the percentage/likelihood of success/ failure at trial?
6. How often would you win out of 10 different trials?
7. Will the judge modify a runaway?
8. Where would you like to begin the negotiation today?

The mediator should be used as your advocate to cause the other party to have doubt about their case. Use the mediator to suggest to the opposition that there is a risk at trial. The mediator can also advance the emotional costs of trial and send realistic signals. However, you must give the mediator accurate information. Mediators will avoid having people relate their bottom line because once expressed they can become a line in the sand that people are reluctant to cross.

At the end of the day, the parties may feel they are at impasse thus resulting in the need to explore other options. To that end, all parties should be reasonable out of the gate. One of the most efficient ways to kill a deal is to make an opening demand or offer that is out of bounds. If you think your opening offer demand as an invitation to the other side to make a counteroffer- rather than an offensive move-you are much more likely to make progress. Make the first “real move”.

Avoid the tit-for-tat approach to settlement. Moving in small increments is not only inefficient, but also ineffective. Break the ice and make a meaningful move.

Other options include looking for business solutions. Generally, a commercial dispute will involve a pre-existing business relationship. If waiting on a cash component will not work, consider exchanging value through other business dealings.

When is a mediation a success? Actually, that would result in a final settlement or, alternatively, a foundation for settlement. Being successful at mediation, and learning how to swing it to your advantage, requires you to trust your mediator and the process. You must remember to come to a mediation in good faith and with an intent to settle the matter while understanding the difference between a mediation and a settlement conference. Be a zealous advocate but be reasonable. Be prepared and know your case. You should also anticipate and know the other side's view of the case. Acknowledge and own both the strengths and weaknesses of your case while managing your client's expectations. Finally, and most importantly, be open to creative approaches to resolution.

PART V.

BARRIERS TO RESOLUTION

Lawyer overconfidence

Many lawyers are guilty of unwarranted confidence in their evaluation of what will happen if a case proceeds to trial. As a mediator I frequently ask the attorneys to tell me what they think their chance of winning is at trial and many times both parties will say 60-80%. Clearly, one or both are wrong. There are many reasons for this but a big one is there is information that the attorneys do not know, and they tend to understate the risk associated with that lack of knowledge. The good advocate in mediation needs to have a realistic view of her case.

Assimilation Bias

This is somewhat related to lawyer overconfidence, and it relates to tendency of individuals to see or hear only that information that favors their position. "Why are people, on average, overconfident in their prediction of future events? There are likely at least two explanations. The first is that people pay differential attention to positive and negative facts." "A separate element of overconfidence appears to be the tendency of people to make self-serving assessments of their ability."[2]

Loss Aversion and Risk Aversion

People attach greater weight to prospective loses than to prospective gains of equal magnitude and will resist making concessions when they are defined as loses. This loss aversion makes parties prefer to risk the cost and uncertainty of further litigation and trial rather than accept a favorable agreement.

On the other hand, people are averse to giving up certain gains in the face of risky alternatives. A settlement option which a party views as a gain is more likely to be adopted than a course of action that would result in litigation, even though litigation could produce greater gains.

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[2] Psychological Impediments to Mediation Success" Theory and Practice, Russell Korobkin, 21 Ohio St. J. on Disp. Resol. 281 (2006)

How a settlement offer is framed matters. When a settlement offer is viewed as a loss, clients and lawyers will likely resist the offer.

The perception of loss

Parties often feel disappointment as they make the compromises necessary to reach agreement. One of the problems is that lawyers focus on what the party has lost to enhance the legal claim and causes the party to fixate on their losses and increase what they expect in compensation.

Clients may fear loss just by ending a case. For example, a fired worker might be asked to give up his claim for reinstatement in return for a money payment. At that point, the fired worker can no longer avoid confronting his loss.

When a decision is seen as having moral implications the perceived loss is greater. To compromise a matter that one sees as involving immoral conduct and in effect lets an opponent buy his way out of improper conduct generates intense feelings.

You need to know as an advocate in mediation that your clients will experience settlement negotiations as a process in which they are forced to give up hopes and expectations.

Reactive devaluation

What this means if the idea came from the other side, it must be a bad idea. This happens because the receiving party views the proposal as being good for the proposer and bad for the recipient. It assumes that the proposing party has access to information about the benefits and costs of agreement that the receiving party lacks.[3] Here the mediator can help by being the person to present the proposal.

Multiple opinions and positions within an organization

This is a problem most frequently seen within businesses. A CEO and a CFO may have different opinions on proper resolution of a dispute. Two divisions of a large company may disagree on which division should bear a potential loss. The mediator often must do a mediation within a mediation to get the players in an organization onto the same page.

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[3] Id. At 316

Zero Sum thinking

Many attorneys see mediation as a strictly zero-sum distributive process. You win, I lose. This thinking is a problem because it inhibits creative thinking to find possible solutions through integrative bargaining. Not every case needs to be resolved by moving money from one party to the other.

Attribution Bias

Attribution theory examines how people attribute causal meaning to behavior. People attribute an event to dispositional characteristics or to situational characteristics. People tend to attribute other people's behavior to internal characteristics, and their own behavior to external characteristics.[4]

A simple example is a college student takes a test and gets the test back and has a grade of 65/100. The student is disappointed and then he decides well the teacher was not a good teacher and textbook was poorly written and the test itself was ambiguous. The student has attributed the results to events outside himself.

But instead of a 65/100 he gets a 95/100. Now the score is attributed to his ability and studying hard for the test. The attribution is internal.

Dispositional Characteristics

Dispositional characteristics concern the character or personality traits of the actor who has created the negative situation. Situational characteristics are external circumstances that are usually beyond the control of someone.

The problem is people tend to attribute the behavior of others to disposition rather than situation to a much larger degree than is warranted.

Dispositional attributions can frequently lead to anger which in turn can lead to the desire to retaliate. The result is a greatly reduced chance of success of mediation settlement.

Another good example is a simple landlord tenant issue. Tenant pays 1000/month in rent. The heater goes out and he calls, and landlord says he will fix it. This is repeated several times but is never fixed. Or the heater goes out and the

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[4] B. Goton, "Attribution Theory & De-Escalation: Transforming Concrete in to Abstract as a Method of Conflict Management http://www.mediate.com/articles/gortonK1.cfm

tenant is told the landlord is out of the country on a medical emergency. But the heater is not fixed.

Tenant moves out and files a small claim action. Landlord offers 900 to settle the matter.

The tenant will be more likely to accept the offer where landlord was out of the country for emergency rather than the landlord just ignoring his request. This illustrates that parties seek to restore equity to inequitable situations. If the litigant feels he was treated badly he is less likely to settle and more likely to seek retaliation in addition to monetary damages.[5]

Cognitive Dissonance

It is psychologically uncomfortable for most people to consider data that contradicts their viewpoint. Parties tend to resolve conflicting information by justifying their own conduct, blaming others, and denying and downplaying, or ignoring the existence of conflicting data.

[5] Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 Mich. L. Rev 107 (Oct 1994)

PART VI.

WHAT HAPPENS IF YOU DO NOT SETTLE AT MEDIATION? IS IT OVER?

A mediation goes on for most of the day and despite everyone really trying it just does not happen. Why? What are the reasons?

There are cases that for a variety of reasons, do not settle during the mediation session. My experience with these cases is that the primary reason these cases do not resolve is because the parties have a different view of what the facts are, and their positions are driven by the "facts" as they understand them. These cases are very difficult to get to resolution because the risk evaluation each party brings to the mediation is based on their "facts" and it is very hard to move parties that do not agree on what happened.

This impasse is frequently seen in construction disputes which involve delay claims, and the cause of the delay is seen through different lenses by the general contractor and the owner. The result is each side sees the position of the other side as unreasonable. Both parties need additional information to bring their understanding of the facts into alignment to allow them to evaluate the risk of going forward with more accurate understanding of the "facts".

When I am presented with a case with these problems it is usually obvious after several hours that resolution is not possible, I will visit with the parties separately and tell them candidly that their different views of the "facts" is an impediment to resolution, and I suggest that we adjourn the mediation to allow sufficient time for the parties to do what discovery they need to get the facts more closely in line. I then advise the parties that I will maintain my working file and plan on calling each party in 60 days to discuss the status of the case.

When I make the call after 60 days, I remind the attorneys that this is a continuation of the mediation and therefore the confidentiality of the mediation continues to apply. I then ask questions to determine what discovery has been done and whether there has been some alignment on what the facts of the delay may be. If the parties are not yet more closely aligned on the facts, I advise the attorneys that I will call again in 60 additional days.

When the parties have gotten to some clarity, I suggest we resume discussions via phone conversations with the lawyers. While this process is not as effective as having everyone in the room and it does take more time, ultimately in about 50% of the cases resolution is finally achieved.

As Yogi Berra said “It ain’t over till it’s over.”