

MEDIATION ADVOCACY TIPS: HOW TO MORE EFFECTIVELY RESOLVE CASES IN MEDIATION

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I. INTRODUCTION

Mediation, for years referred to as an “alternative” form of dispute resolution, has become the most common process used to resolve civil legal disputes. While the advocacy skills in mediation share many common attributes with litigation advocacy skills in general, there are particular skills which can help increase the effectiveness of advocacy in mediation. Understanding mediation theory and practice and recognizing and using particular skills will optimize your mediation experiences and help you effectively resolve your client’s legal disputes. This presentation will share insights and suggestions from litigating and mediating a variety of cases and from professional mediation education and training.

II. BENEFITS OF MEDIATION

Mediation is a process in which a mediator helps the parties identify issues; generate and evaluate options; and reach a voluntary, durable agreement. A skilled, trained, and experienced professional mediator can guide the parties and attorneys through an analysis of the legal issues and underlying nonlegal issues, such as emotional, economic, or political concerns; personality conflicts; and family or organizational dynamics.

Mediation allows a private, confidential assessment of the strengths and weaknesses of claims, counterclaims and defenses, the risks and challenges of evidentiary standards of proof, the expenses of proceeding through hearings, trial and appeal, the risk of fee shifting if applicable, and the emotional costs of the legal process for the client, family, business or organization.

The legal process has a significant impact on the client and his or her family, business or organization. Mediation helps to minimize the emotional, mental, physical and financial strain caused by the legal dispute. When done well and with parties acting in good faith, mediation facilitates a good outcome and minimizes the many pitfalls of trial or evidentiary hearings. Mediation can help clients address their issues and concerns and come up with an enduring, workable solution.

Mediation provides an opportunity for the very different perspectives of the parties to be vetted and understood through the communication skills of the mediator. One of the great strengths of mediation and a reason it works is the mediator serves as a translator, helping each of the parties see the best-case and worst-case alternatives to a negotiated agreement.

Mediation allows creative solutions beyond compensatory money damages. Mediation supports a global approach, including not just the valuation of the

plaintiff's claim, but also the resolution of subrogation issues; the apportionment among multiple plaintiffs or defendants; and the protection of settlement proceeds through a structured settlement or a trust, guardianship, or blocked account.

At any stage of the litigation process, but particularly early on, mediation can accomplish the following:

- * Help parties with ongoing relationships survive the dispute with a relationship intact or at least with hope of reconciliation.
- * Help attorneys work with clients whose actions are motivated by both legal and nonlegal issues, including perceptions of wrongdoing or favoritism, lack of acknowledgment, and resentment.
- * Address complex overlapping legal issues and nonlegal issues that often underlie resistance to settlement of the legal issues, and help the parties move to agreement.

Mediation is less expensive, more respectful, and more inclusive than litigation. It is often more effective because it allows for creative, enduring, workable solutions that a judicially imposed result cannot offer. Court-imposed solutions alone, without the benefit of mediation, often fail because the underlying causes of conflict remain unidentified and unchanged.

III. HIGHLIGHTS FROM MEDIATION THEORY AND PRACTICE

A. Consider Benefits of Early Dispute Resolution

There are many reasons to consider early dispute resolution, particularly in any case with multiple parties, ongoing relationships, complex, overlapping legal issues or complex emotional dynamics.

1. **Minimize expense.** Mediation can be scheduled before significant discovery costs are incurred. If the parties agree to an exchange of information needed for each side to evaluate the case and realistically assess their risks, expensive and time-consuming depositions and written discovery may be avoided.

2. **Preserve relationships.** Parties with ongoing relationships increase the chance of preserving those relationships through early dispute resolution. Litigation can increase the risk of hurtful comments and exacerbate differences in perspective. Mediation can help the parties acknowledge points of agreement while protecting and defending points of disagreement, and then help build an understanding of the differences and a resolution all parties can accept. Resolving the legal dispute before the parties make the relationship worse can preserve what foundation is left of the relationship and allow building it back up, sometimes as part of the mediation process, and sometimes in it's own course over time once the legal dispute is resolved.

3. **Address immediate, real needs.** Litigation is time consuming and

slow. Business, public, organizational, family and personal needs often require immediate attention. Early mediation can provide an opportunity to address immediate needs. Even if a legal dispute cannot be completely resolved early, addressing immediate needs shows concern and acknowledgement, two significant good faith steps toward an ultimate full resolution, and helps minimize the conflict and focus the parties' and attorneys' energy and attention on what is left to resolve.

4. Increase understanding and minimize conflict. Mediation helps the participants understand whatever it is that has led to the legal dispute. With exchange of information and opportunity to ask questions and receive answers, parties may be able to accept the various decisions that have been made and roles played in the business, organization or family.

5. Avoid exacerbation of the conflict. The adversarial system, in spite of its many strengths, tends to polarize the parties, narrow points of view and exacerbate conflict. The sooner the parties sit down with the help of a neutral, experienced mediator to evaluate their legal dispute and consider the risks of litigation, the sooner they will shift into a broader, problem-solving approach. Ongoing discovery and litigation takes a financial and emotional toll on the litigants, and points them toward defending and protecting their own point of view without addressing the other side's point of view. Early mediation provides the parties an opportunity to acknowledge what it is they do agree with from the other party's point of view while still advancing and protecting their own needs and perspectives. Rather than exacerbate the conflict, the mediation gives the conflict room to breathe and the parties' room to work out a settlement.

6. Preserve privacy. Business, organization, family and personal needs are often best addressed privately. Early mediation can best preserve these needs.

7. Increase chance of durable solution. Court remedies are limited and with the passage of time, private, creative solutions may be less likely. When the parties sit down early, they can get a more complete understanding of the competing needs and desires and look for opportunities to creatively and thoroughly address those differences. Exchanging information and collaborating on a solution increases the chance of a durable solution. Court imposed solutions alone, without the benefit of mediation, often fail because the underlying causes of conflict remain unidentified and unchanged.

B. Remember Role of Lawyer Includes Both Advocacy and Giving Broad Advice

1. Rules of Professional Conduct Provide Guidance on Lawyer's Role. Washington's Rules of Professional Conduct and the comments to the ABA Model Rules, upon which our RPC's are based, require lawyers to advise their clients of the alternatives to litigation and to consider the economic, social, political and psychological impact of litigation. The RPCs describe multiple roles of lawyers as a representative of a client: advisor, advocate, negotiator, and evaluator. RPC

Preamble [2]. As advocate, the lawyer “conscientiously and ardently asserts the client’s position under the rules of the adversary system.” Preamble [2]. As advisor, the lawyer “provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.” RPC Preamble [2]. RPC 2.1 specifically provides:

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

2. Rules of Professional Conduct Describe Broad Advisory Role

Several comments to the Rule encourage consideration of mediation and of a broad advisory role.

i. Advice re: Alternative Dispute Resolution: Comment 5 RPC 2.1

“when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”

ii. Straightforward Advice: Comment 1 to RPC 2.1

“A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”

iii. Practical, Moral and Ethical Considerations: Comment 2 RPC 2.1

“Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”

The lawyer’s role is complex: advocate for the client and follow the client’s direction, yet, advise the client as to legal and practical risks and realities. Mediation provides a forum to assist the lawyer satisfy these sometimes conflicting duties.

C. Understand and Use Negotiation Theory and Technique

While the negotiation of a settlement is unique to each set of facts and circumstances, understanding fundamentals of negotiation theory and techniques can demystify the process and optimize the result.

1. Work with your mediator as you develop a negotiation strategy and decision. Most professional mediators are trained, skilled and experienced with negotiation theory and technique. Work with your mediator to develop a negotiation strategy and to assist you and your client with making settlement decisions. Even if you don't share with your mediator your client's ultimate goal or bottom line, you can ask the mediator for help in helping your client reach his or her goal. Both you and your client benefit from the mediator's skills, training and experience.

2. Educate yourself on negotiation theory and technique. There are many excellent articles and books on negotiation theory, psychological factors in negotiations, and communication skills. Seminars abound. Books are available online and on tape or CD. Choose the vehicle that makes sense for you so you can educate yourself and look for and practice negotiation theory and technique. For a list of books you may find helpful, look at the "Resources" page on this author's website, at www.kathleenwareham.com/mediation-resources/

3. Get mediation experience. Seek opportunities to participate in mediation whenever possible. If you are associated on a case as co-counsel and if the case does not warrant the attorney fee for multiple attorneys, offer to participate without charge. If you have a colleague preparing a case for mediation, ask to participate in the mediation, ask questions, and debrief with your colleague when the mediation ends.

D. Select An Effective Mediator

Finding success at mediation begins with selecting the right mediator for your particular case. Unlike judicial assignments, you get to and should consider your selection carefully. Differences in approach, experience and skills may make particular mediators best suited for a particular case. Are there multiple clients or stakeholders who will need to participate? If so, select a mediator skilled in multiparty cases. Are there complex emotional dynamics? If so, select a mediator with attentive listening skills, patience and an ability to keep parties on track and moving forward. Is settlement unlikely or do the barriers to settlement seem insurmountable? If so, select a tenacious, persistent, high-energy mediator. Other attributes to consider are legal experience, communication skills, creativity,

work-ethic and willingness to prepare. Talk to potential mediators to learn about their approach and background. Ask for references and seek the opinions of the

mediator's former clients and of your colleagues.

E. Consider Benefits of Pre-Mediation Conferences

Having conversations with the mediator prior to the mediation session, on the phone or in person, significantly increases the opportunity for success at the mediation session and helps make the session more productive and efficient. Either after the mediator has read the submissions, or as part of the process of setting up the mediation session, the mediator confers with counsel about the legal issues, the stakeholders, the decision-makers, and the people influencing the decision-makers. The mediator determines if the client or client representative with settlement authority will participate in person or by phone, and if by phone, discusses how the dynamic information exchange and negotiation steps which will take place during the mediation will be communicated to the person with settlement authority. If the mediation submission has not made it clear, the mediator asks for a summary of the settlement negotiations, if any, to date, and asks about perceived barriers to settlement. It is not uncommon for the mediator to ask questions beyond the legal issues, such as a question about the relationship of the stakeholders, which the attorney may not have thought about, but which the mediator views as key to getting a negotiation on track, or to avoiding impasse. The pre-mediation conference allows the mediator to clarify what information has been exchanged, and what, if anything, provided to the mediator is confidential. Finally, the mediator and attorney can discuss the mediation process for the particular case, and whether the attorney has any suggestions, requests or concerns.

The pre-mediation conference allows the mediator to walk into the mediation session fully prepared. It increases the likelihood of the attorneys preparing thoroughly and helps avoid pitfalls of misunderstanding about the process or the participants. Particularly in cases with multiple parties, or complex legal issues, or layers of emotional, factual or legal issues, the process is more smooth, efficient and effective if the mediator has a pre-mediation conference with counsel.

F. Prepare, Prepare, Prepare

Competent representation of a client in mediation requires thorough preparation. The legal knowledge required for competent representation in the litigation of a dispute is the same knowledge required in the mediation of such dispute. But the preparation and skills needed for competent and successful representation in mediation are quite different. A key step toward a successful mediation is preparation. The following practice tips will help you enter the mediation process ready to reach a successful result.

1. Determine the necessary and helpful participants. Anyone whose decision is necessary for settlement must participate. Persons of influence to a decision-maker should participate or be available to the decision-maker. Participation should be in person for the most effective session. Mediation is a dynamic and

difficult to predict process, so it can be difficult to keep a person with settlement authority who is not present in person fully apprised of the factors effecting the mediation process. In person participation is best.

2. Share information in advance of the mediation. If you have information the other party or parties believe they need to evaluate the strengths and weaknesses of the case, don't save it for the mediation. Disclosing pertinent information in advance is an indicator of good faith and provides an opportunity for the other parties to fully evaluate the case and the risks of continuing the litigation.

3. Prepare a mediation memorandum. Help the mediator understand the case by providing a summary of the facts and the law rather than attaching pleadings and briefs. Tell the story of the case: who, what, when, where, how. Be succinct but not necessarily brief. The mediator will appreciate the details as summarized in your letter and does not need back up documents. For example, tell the mediator of an admission in a party's deposition but don't provide the deposition transcript. Rather, bring the deposition transcript to the mediation if you think you'll need to reference it. Finally, include a discussion of any settlement negotiations. The mediator needs to know what has already transpired even if there is not a current offer or demand on the table.

4. Be timely when submitting the mediation memorandum. If the mediator requests the submission three days prior to the mediation, honor that request to enhance the opportunity for the mediator to work for you. The mediator should read all the material submitted and then may have questions prior to the mediation, or may simply want some time to think about the dispute.

5. Meet with your client in advance of the mediation. This will help you prepare yourself and your client for the mediation.

- a. Discuss with your client the mediation process. Help your client understand that there will be significant blocks of time where the mediator is working with other parties and encourage the client to bring reading materiel, a laptop computer or other things to help occupy his or her time. This is not simply a matter of courtesy: it helps the client remain sufficiently patient to allow the process to unfold and work.
- b. Help your client think about his or her case from the other party's point of view and from a jury or judge's point of view.
- c. Discuss with your client the realities of litigation: the likely expenses of proceeding to trial, including attorney fees, expert witness fees, etc; the uncertainty of outcome; the risk of fee shifting; the lack of privacy; the risk of appeal; time; the emotional impact on the parties. Evaluate the costs and benefits of ongoing litigation (BATNA/WATNA)

- d. Avoid developing the client's position regarding settlement and instead focus on the client's basic needs and interests. Discuss with your client the underlying issues (emotional, social, psychological, moral, political, economic)
- e. Talk about good faith: even if hope of an acceptable settlement is dim, remind your client that the vast majority of cases settle and encourage your client to work positively and energetically with the mediator's professional help to creatively explore settlement options.

6. Prepare yourself to mediate. It is difficult to switch gears and look at a case with a broad perspective, not just that of an advocate. One solution is to have settlement counsel handle the mediation preparation and process. Short of that, sometimes associating other counsel helps. But if you are both the advocate and the advisor, simply being mindful of the difference in role can help you succeed in mediation. It's important to remember that negotiation is a dynamic and creative process, and different solutions acceptable to your client may emerge. The mediator needs to know more than your willingness and ability to try a case and your commitment to your client. The mediator needs your help as a problem solver in order to help your client have confidence in a resolution.

G. Consider Benefits of Joint Session

A well-managed, intentionally organized joint session is an effective technique. The joint session can be the start of the formal mediation session, if pre-mediation conferences have been used, or can take place after initial private caucuses. It can include or exclude comments from counsel, depending on the opportunity to confer with the mediator and determine the purpose of comments from counsel. The mediator uses the joint session to set the stage for settlement, manage the parties and attorneys expectations, and set parameters which will encourage settlement. The joint session helps focus all the parties and all the attorneys on the common goal, dispute resolution. It provides an opportunity for counsel to establish rapport with each other and with the parties as problem solvers, not just as adversaries. It is part of the process which encourages and allows the attorneys to "put down their swords and shields."

Depending on the stage of litigation, and on the participants in mediation, the joint session often provides the first opportunity to meet other stakeholders or persons of control or influence. An insurance claims representative or risk manager or professional fiduciary may have never met the plaintiff or petitioner, or his or her family. Simple introductions in a joint session can provide subtle, helpful information to assist with settlement negotiations. Even if the plaintiff, petitioner or family member doesn't speak, physical presence in the room with all the stakeholders while the mediator and/or counsel explain the issues in the case provides an opportunity to be heard and acknowledged, an important beginning point in the negotiation.

In a well-managed joint session, the mediator explains the mediation process, including the roles of the parties, the attorneys, the non-party participants, and the mediator. The mediator extols the virtues of mediation and encourages good faith participation, hopefulness and confidence in the process. The well prepared mediator demonstrates in the joint session her thorough preparation and her understanding of the legal issues and the underlying issues, to develop confidence in the mediator and to show acknowledgement of the parties' concerns and needs, another key step in negotiation. The mediator manages parties' expectations about the process, including encouraging acceptance of the time negotiations can take. The mediator provides suggestions to the parties and attorneys for managing their time and, if appropriate, their emotions, during the mediation. The mediator can comment on interpersonal dynamics during a joint session, in a matter-of-fact manner, to normalize what parties are experiencing, a key step of negotiation which helps the parties broaden their perspectives and begin to look at a dispute less passionately. Finally, the joint session is an opportunity for the mediator to efficiently confirm the participation of those with settlement authority, and to efficiently confirm the agreement to mediate, including agreement regarding privileged mediation communications.

H. Be Willing to Suggest Mediation

Suggesting mediation is not a sign of weakness. Suggesting mediation makes sense because mediation works. Lawyers can serve their client's interests best by identifying early on what each side needs to know to evaluate the dispute from their perspective, exchanging information to allow the evaluation, and getting all the stakeholders to the table as soon as possible. The timeline and amount of necessary discovery will vary from case to case, but mediation provides a form of dispute resolution that is not just a prerequisite alternative to trial; it is a different method of dispute resolution proven to be effective and efficient, producing durable solutions and helping to preserve ongoing business, organizational, family and personal relationships. From the beginning of the litigation, a plan should be made to prepare and develop the case for mediation, not just for trial.