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Preparing clients for mediation: Meet them where they are

Experienced counsel know mediation preparation is not one-size-fits-all. Tailoring the process to each client's experience, needs and expectations can put them in the best position for a successful outcome.

By Zia F. Modabber

Attorneys approach mediation in different ways. Some arrive with defined goals and negotiation strategies; others prefer to adapt as the process unfolds, adjusting their positions based on their clients' needs and instructions. There is no single right way to participate in mediation.

Importantly for this discussion, clients also come into mediation from different places. Some have considerable experience with the process and know what to expect. Others are brand new to it; they know nothing about the process, the roles played by participants or how the day might unfold. And they are anxious about all of it.

To put a client in the best position for a successful outcome, experienced counsel know that mediation preparation is not a one-size-fits-all proposition. Preparatory conversations and strategy sessions are necessarily tailored to align the client's needs with what the lawyer will provide.

The lawyers' preparation: Scenarios and possible outcomes

Let's dispense with the obvious first: The lawyer has to know the case better than anyone else who walks into the room. Of course this includes the merits, but it also includes having thought through potential outcomes from the client's perspective. What are the best case, worst case and reasonable ranges of the most likely outcomes?



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Critically, this analysis must also include the cost to get there — attorney's fees and who bears them, expert fees, and other possible third-party costs (investigators, etc.). The timing of the client's expenses must also be made clear, because they can have unique importance based on such things as corporate budgets and fiscal year-end goals. There might also be unique cash-flow issues for certain types of businesses or individuals.

In all litigation, fees may be one monthly number at the time of the mediation, but if the matter is not resolved, they might be about to triple with summary judgment motions,

experts, pretrial motions and trial preparation. A substantial portion of the total fees to be spent before trial is often saved by settling at the right time, resulting in the exact same settlement number having vastly different financial consequences based solely on timing. A \$100 settlement today is not the same as a \$100 settlement tomorrow after another \$50 is spent in legal fees.

The amount of time and the timing of the client's participation in the litigation might also be important factors for the client to consider. Imagine, for example, a performing artist's upcoming tour or movie shoot, or a corporation's annual share-

holder meeting scheduled to coincide with the potential trial date.

The true value of a settlement is lost if the client or the attorney focuses only on the merits settlement amount and ignores the totality of relevant issues, including the time and money that must be invested to attain a verdict at trial.

Preparing the client

The sophisticated client

Consider a sophisticated corporate client, one whose senior executives and counsel are likely to be highly experienced, having gone through the mediation process several times. Their time is paramount, and they

very likely do not want or need a preview of the process.

If the executive participating in the mediation has not been involved day-to-day in the dispute, he or she may need to be quickly brought up to speed on the strengths and weaknesses of the case. If, however, they understand the merits, the experienced client will want counsel to add value to what they already bring to the table.

This client appreciates not just legal advice on the merits, but a thought partner who continues working through the meaning of a particular outcome beyond this specific dispute (which could be one of many), and how it plays into the overall business. Is this case simply about money, or does it involve issues of public perception and/or a principle that must be prosecuted or defended because of the broader implications for the business in other contexts?

If the client is willing — and some are not for various reasons, including competing demands on their time — a pre-mediation brainstorming session can be very helpful. The attorney can quickly cover the merits, and then the client can identify the top-line points for settlement, taking into account the issues discussed above. Counsel might also discuss tactics with the client such as whether to “play hardball” or, in the alternative, devise a negotiation plan that uses a carrot instead of a stick.

There is no “one size fits all” method for negotiating, and each case lends itself to a different approach that sophisticated lawyers and clients should discuss. Counsel should help clients get clarity around that approach based on whether and how it serves the ultimate goal. These are among the important reasons for building a partnership with sophisticated clients as it leads to creating a plan, and mapping out a path to executing that plan, that gives the greatest chance for the best possible outcome.

The less-experienced client

Now let’s consider a different type of client: perhaps an individual executive or employee, a creative, a

performer or an artist, or anyone else who has very little experience with mediation. For these clients, the focus and tenor of the preparation will be very different from what is done with an experienced client.

Preparation for these clients really should start well before the mediation. As with a deposition, lawyers want their clients walking into the mediation comfortable, confident in the attorney and the process, and knowing what to expect as the day unfolds. The client should know, for example, that there will be separate rooms and that they don’t have to see the other side if they prefer. They should also understand that the mediator will not make any decisions about the case, but will be going back and forth with questions, thoughts and suggestions in service of negotiating a settlement.

For these types of clients, it can be important to highlight that they should be prepared for a long day, and that being impatient or in a rush to leave is anathema to achieving the best result. (For some lawyers, a self-reminder may not hurt either.) Clients also appreciate being forewarned about long delays while the mediator is in another room, as it gives them an opportunity to manage their time. During a recent prep session, for example, I advised a band client that we might be sitting together for an hour or more waiting for the mediator. The clients decided to bring instruments to the mediation so they could work on new songs they were writing. Another client took a 30-minute Zoom meeting when the mediator said he wouldn’t be back for as much as an hour.

Once I told a client that if she gave me another two hours in the mediation, there was a good chance we could improve the settlement by one million dollars or more. She did the quick math on the value of that time, agreed to (im)patiently wait, and we got it done.

The point is that helping a less experienced client prepare to let the day unfold in an unrushed manner can make a material difference in the ultimate outcome. Ending the day unnecessarily early because the client is bored or antsy fundamen-

tally undermines the chances for success. Removing this potential obstacle should begin before the mediation begins.

Clients should also be prepared for the fact that the day will inevitably happen in phases. It will begin with lengthy and often detailed discussions about who is right and why, based on the merits. Novice clients should be properly prepared for this, as well as the fact that they will probably see a fair amount of posturing. At some point, however, at the coaxing of the mediator or counsel, the conversation will (indeed must) shift to “OK, how much?”

For some litigants, this shift can be the hardest part of the day. Individual litigants, in particular, can view their lawsuit from a deeply personal perspective, leaving them stuck in a mindset of “I’m right and the other side has to admit it.” The preparation session is a less pressurized time to help prepare this client to move beyond being right, to shift their perspective to the fundamental point of their efforts — finding the terms upon which they are willing to end the litigation.

Before and during the mediation, some less experienced litigants may also appreciate talking through how negotiations actually work. This can include a discussion about incremental moves that might be made by the parties, as well as what those increments might be signaling — such as bluster versus a real move to draw out a meaningful counteroffer. When it makes sense, the attorney and client can loosely map out in advance offers and counteroffers they might make to send their own signals; this is usually more helpful during the mediation, once an offer or counteroffer has been exchanged. These steps will not be written in ink, but many clients find that having a plan gives them a sense of control and keeps them from feeling lost when they must respond to an offer.

Finally, the preparation session is also a good time to explain mediator’s proposals and brackets so the client is not forced to digest the concepts in the heat of discussions. Even when a client has decided before the mediation that “this is our

bottom line,” the tools a mediator uses to encourage movement — such as mediator proposals or brackets — will not always be understood or appreciated by less experienced clients. Despite a client’s firm intent in the morning, a skilled mediator will often deploy these tools in the afternoon to help the client see past obstacles toward compromise.

Conclusion

In preparing for mediation, attorneys should think carefully about where the client is coming from and be prepared to meet them there. Mediation preparation can be the most concentrated time spent with a client after the attorney is hired. For this reason, it should also be used to provide a clearer window into the client’s needs and wants — critical to achieving a successful outcome. And this benefit can last far beyond just the mediation session. Investing in thoughtful preparation that is focused and cognizant of the client’s particular needs is the surest path toward seeing a meaningful return.

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