Some Practical Tips For Success In Your Mediation

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Often it is said that "the best result in mediation is the one that makes everyone equally unhappy." Even so, experience proves that the party who usually comes out best in mediation is the one who is most prepared. This article provides some common sense, practical tips to help with that preparation.

At the outset, parties must understand that mediation is the antithesis of litigation. Mediation succeeds best when all parties and their counsel are prepared to be collaborative, forthcoming, and patient. In other words, it's the exact opposite of what parties have experienced in litigation.

Yet, mediation thrives mostly because the risks of going to trial are so substantial. A defendant that cannot resolve a case before trial runs the risk of a court or jury awarding substantial damages to the plaintiff. The defendant also may have to pay the plaintiff's attorneys' fees and costs. Even when defendants win (and they do), the fees they pay to their own counsel to secure a defense win are substantial. Plaintiffs also are at risk. While many plaintiffs may have contingent fee arrangements with their own counsel, a losing plaintiff likely will be on the hook for substantial hard costs incurred in litigation by their own counsel. Even worse, they can be responsible for the defendant's legal costs, and possibly attorneys' fees. Given these terrible alternatives, most parties either choose to mediate their cases, or are ordered by the Court to do so.

If you are going to mediate, do it well. The following tips can help you secure a successful mediation:

1. Pick the Right Mediator.

Like everything else in mediation, the selection of the mediator is voluntary. Consider whether your ideal mediator is a retired judge who has tried cases for years and has seen virtually everything; or whether you need a retired judge or counsel with a specialized expertise in the subject matter (i.e, class action or collective lawsuits, disability claims, qui tam; water rights, etc.).

In any case, **always** consider whether you can live with a mediator the other side has proposed. If so, you already have their buy-in on the mediator's credibility, since they proposed the mediator in the first place.

2. Pick the Right Time to Mediate.

Early mediation (a pre-filing or pre-discovery mediation) obviously saves the most money. However, mediating very early will succeed only if the parties already know the facts and legal issues presented by each other's cases.

A better time for early mediation may be at the end of the "first wave" of discovery. Once the parties have exchanged discovery on the basic documents in the case, exchanged basic interrogatories and responses, and have taken the principal depositions, they should know enough to have a meaningful mediation.

Some parties choose to await the filing of a dispositive motion. Many defendants like the idea of filing an MSJ and then offering to mediate while the motion is "hanging over the plaintiff's head." This can be effective if the defendant has a strong motion. The risk for a defendant in

doing this is that once a plaintiff and his or her counsel have seen the motion, they may believe they can beat it. So much for the defendant's leverage.

In the end, the particulars of the case will dictate the timing of your mediation. Just keep in mind that in almost every case, the **worst** time for mediation is when you get to the courthouse steps for your trial.

3. Properly Prepare Your Client.

Intentionally or not, lawyers regularly over-inflate the expectations of their clients in litigation. Prior to the mediation, counsel should realistically prepare their client for the mediation process. While sophisticated business clients may be well versed in the process, many plaintiffs and defendants have little idea what to expect. Regardless of the client, be honest with them about the strengths and weaknesses of their case. No plaintiff's case is a guaranteed million dollar lottery hit, and no defense case is a slam dunk defense verdict. Every experienced lawyer will tell you that they have won cases they should have lost, and lost cases they should have won.

Clients also need to know that mediation is not a proxy for trial, and that no one is going to "win" the mediation. They should understand that the mediator's job is to probe and poke holes in each party's case. If the mediator seems skeptical of your position, make sure the client doesn't lose heart, but understands that the mediator is doing the exact same thing in the other room.

4. Avoid 11th Hour Surprises.

Mediation is not the time to play "gotcha." Discovery aside, when a party trots out a previously undisclosed fact, the most likely result is that the mediation will come to screeching halt. Even

worse is disclosing your killer fact to the mediator, and instructing the mediator to not share it with the other side. You gain nothing.

Counsel is far better off alerting the mediator and the other side of such facts in advance of the mediation. If your killer fact is that good, get it out there.

5. Mediation is Not About Counsel.

Every experienced mediator will assume that counsel knows what they are doing until they prove otherwise. The mediation is about the party and their case. The mediator doesn't need a long winded recitation of counsel's academic prowess, stellar trial record, or the number of million dollar verdicts won or defensed. The mediator also will presume your client already knows about their counsel's skills. That's why they chose you.

Nor does it profit anyone to denigrate their opposing counsel. You may have a poor opinion of their skills, and you may even have trashed them to your client. However, counsel who do this also should prepare in advance the speech they plan to give their client when they lose to the hack on the other side. By keeping your opinions to yourself, the mediation is more likely to be successful.

6. Talk to the Mediator Before the Mediation.

Set a one on one call with the mediator for 1-2 days before the mediation. By then you likely will have exchanged mediation statements and the mediator will have read them. This will give you an opportunity to introduce yourself and your client, and let the mediator know about any special considerations you think may help. Any insights you can give to the mediator about your

client, or even about the other party, will be welcomed, and can save valuable time in the mediation process.

7. Explore Non-Monetary Consideration.

While this hardly ever works, it's still worth a try. Litigation and mediation are almost always about the money, and that likely will carry the day. However, exploring early in mediation non-monetary issues such as a carefully drafted letter of reference, or an apology (or who knows what else), can help set a conciliatory tone that may help the parties get to a number. In addition, raising the issue late in a mediation may be just what the parties need to bring the deal home.

8. Let the Client Talk.

Don't be afraid to let your client talk freely about the facts and impact of the lawsuit. Letting a plaintiff tell his or her story to the mediator will let them know they are being heard, and can do wonders in getting them to a place they feel they can let go of the lawsuit. The same is true for defendants; let the party or party representative explain their view of the conflict that led to the lawsuit and the impact the suit has had. By doing so, you will give the mediator the ability to better relate to your client, and more importantly, carry your client's message to the other side

9. Provide a Draft Settlement Agreement in Advance.

An invaluable step is for one of the parties (often the defendant) to prepare a draft settlement agreement with the terms the defendant is planning to require, with the settlement amount left blank. Such terms might include conditions for payment in a lump sum or over time; separate checks for fees, emotional distress and wages; one way or mutual releases and confidentiality

clauses; no-rehire clauses (where permitted); percentage designations of settlement proceeds as taxable wages, and the like.

The preparing party should provide the draft agreement to the mediator and opposing counsel well in advance of the mediation so it may be properly reviewed. There's no reason to work hard to get the parties to a number, and then let the deal fall apart over the details.

10. Tie It Down.

When you finally reach a deal, confirm the terms of the deal in writing, and have it signed by the parties, before the mediation concludes. If you've not yet reached agreement on the formal draft settlement agreement, most mediators have a form of "term sheet" the parties can complete and sign. The terms need to be clear enough to be enforced by a court, in the manner outlined by California Code of Civil Procedure §664.6. This process is easy enough when the parties are physically present, but still can be obtained in a remote or Zoom context via Docusign or a similar platform. Getting something signed, even electronically, is better than nothing.

Every mediation is different, but these steps can be applied to nearly every mediation. Now, all you have to do is get the parties to a number….