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Mediation is more than a negotiation, it's a strategic battle worth preparing for

By Greg Derin

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Ten years into their siege of Troy, the Greek army was staggering. It had lost its great general Achilles and its endeavor had stalled. The army feigned a retreat from the city, removing their fleet to give the impression that they had withdrawn from the battle. Whether using the Trojan Horse of myth or a sophisticated battle machine resembling an animal, elite Greek troops gained admission to the city under the guise of an offering, and during the night sprang forth attacking Trojans in their sleep and allowing the fleet to return to aid in the speedy defeat and capture of Troy.

Careful planning and execution brought a swift end to a costly and emotional crusade. However accurate, the story of the Trojan Horse has passed from generation to generation as an example of careful planning and the power of deception. There was no small element of luck involved in the success of the plan, as the device escaped detection even after the Trojan priest Laocoon warned that the suspicious gift seemed part of a plot (i.e., beware of Greeks bearing gifts). As Seneca famously recounted centuries later, "[l]uck is what happens when preparation meets opportunity."

Counsel toil vigorously to prepare for trial. Beyond all pre-trial motions and discovery, each "side" arrives with motions in limine, jury instructions, prepared voir dire, outlines of opening statements and witness examinations, exhibit and witness lists, and endless last-minute requirements to avoid unwelcome surprises and meet the expectations of clients, counsel and the court. Why then, is mediation often viewed as a "negotiation" capable of being handled on an ad hoc basis? Like trial, it is true that one must be prepared in mediation to react flexibly to the behavior of an opponent. Yet no one would walk into a courtroom without a thorough plan, careful groundwork laid, and prepared clients. Why do so in mediation?

Preparation for mediation begins when the client walks into the office for the first time. When counsel undertake a new representation, the primary inquiry is about the client's objectives. During the course of litigation, counsel reassesses that inquiry to see how it may have changed in light of discovery, the marketplace, changes in the client's finances, or insurance status. In mediation, objectives can be satisfied that cannot be achieved in a courtroom based on available legal theories. The options for resolution are as flexible and creative as the willingness of the stakeholders. But, as the legal scholar Yogi Berra put it, "[y]ou got to be very careful if you don't know where you're going, because you might not get there."

Aside from understanding a client's objectives, what practical steps can be taken to position one for success at mediation?

Briefing. Preparing two types of submissions can be extremely

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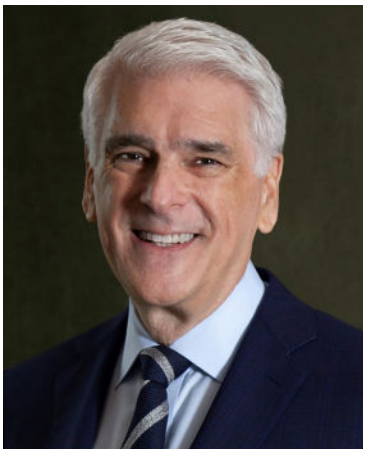

powerful. First, briefs *exchanged between the parties* at least a week before the mediation create multiple advantages. This brief should include (i) a description of the factual and legal issues relevant to a disposition of the matter, (ii) a detailed description of damage claims, (iii) the procedural posture of the dispute, (iv) the latest offers and demands, and (v) any special requests regarding the mediation process. Preparing and exchanging this brief accomplishes several important goals. As noted earlier, cases evolve.

Preparing this brief with the client engages them in the mediation process, brings them fully up to speed concerning the status of the case, and aids the discussion regarding expectations and approaches during the mediation session. Exchanging briefs reduces the too-frequent approach of asking the mediator to convey arguments to one's adversaries. The mediator may be talented but knows far less about the case than the parties and counsel. Bypassing the faux confidential designation of most briefs shortcircuits the time-consuming process of creating a level playing field regarding fundamentals and narrows the issues and facts in dispute. If fairly drafted, parties should at least conditionally acknowledge "weaknesses" and focus on credible points of disagreement.

Second, the parties should submit to the mediator a truly confidential statement that identifies what each party perceives to be the barriers to settlement, proposes ideas for overcoming those obstacles, and sets forth facts and issues that the parties believe that the mediator should know before s/he can attempt to assist with the settlement of the matter.

Pre-mediation conferences. Counsel should insist on a pre-mediation conference with the mediator. Most mediators now conduct such conferences as a matter of routine. For those who do not, counsel should reach out when they feel it is important or should evaluate whether they will be getting the attention they deserve. As one who routinely spends as much as an hour with each side in pre-mediation conferences, I find them extraordinarily helpful. Counsel often share important information about clients, obstacles to settlement, and insurance issues.

Pre-mediation conferences permit the mediator to alert counsel to issues raised by their briefing which should be considered or might require input or the availability of other team members to secure a productive session. The mediator and counsel should also discuss the process - will there be joint sessions, an opening meet and greet, and an opening presentation?

Important issues for discussion at pre-mediation conferences also involve the participants and insurance. Will attendees have the requisite authority, are they "the problem" that created the controversy, is the consent of others necessary not only to reach a resolution but to show respect, parity, or send other important signals? What should the mediator know about insurance? Has insurance been disclosed? What are the relevant coverage issues and points of contention between carrier and insured? Has the carrier fully vetted the claim and is it prepared for the process?

Preparing clients. Like depositions, mediations are not familiar events for many participants. Counsel should prepare their clients, after learning about the mediator's process, to know if the parties might meet during the day, whether the client will have an opportunity to share stories, if they will be asked to sign anything, or if they can go home and think about it or speak to Uncle Wilbur. How should they address the mediator? What should they wear? And, of course, there are the long breaks while the mediator is speaking with counsel and parties in the other room - how should parties be prepared for that part of their day?

Creative solutions. From my perspective, the area in which most parties, counsel and frankly mediators, engage in insufficient preparation is the quest for creative integrative solutions. While many cases can be resolved by classic distributive bargaining (i.e., how much money or other assets must move from one pocket to another to resolve the dispute), others miss the opportunity for win-win solutions that leave both parties more satisfied and rewarded if not explored. When dealing with rights-based disputes such as ownership of intellectual property or the exercise of disputed rights to real property or other contractual interests, expanding the pie to permit all stakeholders to share resources is a more gratifying solution. This requires a willingness to consider business plans, creative approaches, and involve personnel beyond legal departments. Such approaches require advance planning and preparation, participation by authorized representatives and a willingness to consider traditional and nontraditional resolutions. In this context, pre-mediation conferences bring great value and counsel willing to probe remedies with their clients will achieve greater results than others, and perhaps better and more sustainable long-term business success than could be achieved by a victory at trial.

As Jonathan Swift observed, "[v]ision is the art of seeing things invisible." Take the time and embrace the challenge fully to prepare for mediation by exploring all potential options for resolution.