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Keys to successful mediation — Part I

By Charles G. "Skip" Rubin

Most attorneys agree that a favorable settlement is the wisest goal in litigation. Further, that mediation with an effective mediator is the surest way to get there. Unfortunately, many do not understand the benefits available in mediation and how to obtain them.

A "successful" mediation results in a resolution of a dispute regardless of the stage of the proceedings. Every party is a winner in mediation. They have avoided the risks, expenses, stress and other detriments of trial ("trial" here includes arbitration), while obtaining an acceptable resolution. But a lawyer can lose a mediation by not properly utilizing the process.

So what are the keys to a successful mediation?

Start with the initial client interview. Give the client a realistic assessment of her case. Plaintiff's counsel should state what overall costs, fees and net recovery range may be reasonably expected. Defense counsel should inform the client what her possible exposure is. Never exaggerate. There is no surer way to subvert settlement than having a party with unrealistic expectations. Clients with a reasonable idea of the outcome at trial are more willing to compromise.

At the first meeting and with every further communication, attorneys must work to develop a rapport with clients. This fosters adequate client control. The client must trust counsel's advice and believe her best interests are counsel's foremost consideration. This is done by listening with a sympathetic ear and being as reassuring as possible when advising her.

If, despite your utmost efforts, you cannot maintain control, let the mediator know in advance. This is one of the primary concerns a mediator has regarding the attorneys involved. Where control is lacking, the mediator's task is more difficult. Where counsel is having a difficult time convincing a recalcitrant client that an offer should be accepted, a capable mediator will assist.

Next is something you should not do: prepare for battle. Even though you are an advocate for your client, and must present the strongest case possible, there are two distinct roles you play.

At trial, you are a gladiator fighting tooth and nail to prevail. In mediation, you are a peacemaker seeking a settlement that, while maximizing your client's interests, is satisfactory to both sides. This requires you to leave your "take no prisoners" attitude at the office. To do otherwise is counterproductive to the mediation process, and your client's best interests.

Some attorneys confuse a mediation with a judicial mandatory (MSC), or voluntary (VSC) settlement conference. They are different in both process and approach. Sitting judges who entertain settlement conferences have limited time. Often, they have limited training in mediation or negotiation, and rely on their judicial authority to mandate a settlement. A trained mediator has unique skills and ample time to craft a resolution. The mediator cannot compel anything. Mediation is a voluntary, collaborative effort. Of course, a mediator's professional success depends on his or her ability to resolve cases, making settlement a secondary incentive to facilitate a resolution.

Successful mediation requires dedicated counsel. Any good trial lawyer will tell you, the three most important things to litigation are preparation, preparation and preparation. Same goes for mediation. Counsel must become fully educated regarding the facts and the law alleged by all parties, and their respective contentions.

Although some cases have small potential damages, and costs must minimized, most matters worth pursuing require as adequate discovery as possible before significant decisions are made toward resolving it. "Adequate" discovery does not require full discovery; it means having enough verified facts and law to rest assured that you are well informed about the matter. Do not examine the facts and law only from your perspective, but from your adversary's as well. This includes investigating and verifying your own client's representations to you, as she may be mistaken or misrepresent the facts.

Do an estimated accounting of all expenses, including costs and fees up to mediation, then through trial, and finally, for a potential appeal. List them separately. The expenses of the other parties will probably be similar. Plaintiff's attorneys should determine what net recovery, or if you are the defense counsel, what gross judgment amount, would be the likely result at trial. Then determine a reasonable range of settlement you feel would be acceptable. Memorialize all of your conclusions and the reasoning for each.

Next, prepare your mediation brief. Too many counsel view the brief as merely pro forma, requiring only a sketch of the generalities of the dispute. That is short-changing your client by limiting the mediator's ability to strategize in advance. The brief should contain as objective, thorough and supportable a rendition of the strengths of your side as possible. Puffing and hyperbole are discouraged and will ultimately be exposed. Confidential subjects, such as the admitted weaknesses of your case, should be submitted to the mediator in a second, confidential brief, so labeled.

The parties should exchange briefs in advance. Unfortunately, few counsel provide a brief to the opposition, choosing to only provide a generalized confidential brief to the mediator. Even then, few briefs discuss the recognized weaknesses of the submitting party's position and the opposition's potential strengths. Such discussion is advisable, as the mediator must know as much about the case globally as possible.

Often, counsel will assign the preparation of a case and brief to a law office subordinate. That's fine, if the senior attorney later takes the time and effort to meet with that person, to be fully educated about the case, to review, and when necessary, revise the brief. It is distressing to a mediator to have the senior counsel appear and attempt to mediate a case without a true working knowledge of the facts.

Once the brief is in its final form, send it to the mediator, and if possible, to the opposing counsel, being careful to send confidential briefs separately to the mediator. Most mediators want briefs several days before the mediation. We are often burning the midnight oil reading a brief emailed to us at the eleventh hour. This leaves little time to digest the brief and strategize.

Finally, you must prepare your client for the mediation. Do not rely on the mediator to explain the process. Some do, but many don't. Explain mediation is entirely voluntary. Give her your best legal advice regarding an appropriate settlement. Tell her only she can decide whether to settle and what the terms will be. If the other side agrees, there is a settlement; if not, there will be a trial. Emphasize that the mediator has no authority to dictate a settlement. This will relax your client and allow her to be more attentive to the issues necessary to make the best decision.

Emphasize that mediation is strictly confidential, so nothing done or said at the mediation will affect the trial should the case not settle. Explain that a settlement cannot be reached without all parties compromising. Everyone has to give something up, and no one leaves a settlement having obtained the result they felt was their due.

Some attorneys telephone or email the mediator prior the mediation to confer ex parte. Unless there is something compelling to advise that is not contained in the mediation brief, most busy mediators do not encourage this. Their minds will probably be focused on their present mediation, and they may not later recall the information you gave them orally. If the conversation is lengthy, your client may even incur additional fees.

Additional important information is usually best told at the beginning of the mediation day, when the mediator will be concerned only with your matter. Issues such as lack of client control; your client's, or your opponent's or their attorney's idiosyncrasies to be considered or avoided; or other unique concerns. Do not put that in the written brief, as this information may be disturbing to clients if they read the brief. It is essential to keep your client calm and receptive to all suggestions of settlement.

Charles G. "Skip" Rubin *was both a plaintiff's and defense trial attorney. Elected in 1983, he retired as a judge from the Los Angeles Superior Court after 23 years. He has been a mediator and arbitrator with Alternative Resolutions Centers (ARC) since 2006. He may be retained by contacting ARC, at (310) 284-8224, or reached at charlesrubin@roadrunner.com. His profile is at arc4adr.com/honcharlesgskiprubin.html.*

CHARLES RUBIN
Alternative Resolutions Centers