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Keys to successful mediation — Part II

By Charles G. "Skip" Rubin

Once you have properly and fully prepared for the mediation, what next?

The first order of business is to be sure all parties with conflicting interests are assigned separate rooms to meet (caucus) with the mediator privately. The plaintiffs and defendants are not the only parties with differences. Often, parties on the same side have conflicting interests. Parties with competing interests may choose to be in the same room during part or all of the mediation, but that is a specific tactical consideration left to counsel.

Some mediators begin with a joint session to discuss the generalities of the mediation. However, the parties should request going to their own separate caucus rooms before an intimate discussion of their side of the case. Only there can confidential disclosures be made.

A few mediators only use a joint session with all parties present for the entire mediation. But this method impairs the chances of resolution, and should be avoided in all but the most unusual circumstances.

The interaction between counsel and the mediator is crucial to an effective mediation. As mentioned in the first installation of this series ("Keys to successful mediation — Part I," Feb. 13), mediation is a collaborative effort involving all of the participants. The mediator's role is to facilitate the settlement by providing his or her impartial objectivity in assessing the underlying dispute, based on extensive training and experience in negotiating settlements.

Statutory confidentiality provisions that apply to all mediations, unless expressly waived, allow counsel to be fully candid with the mediator without concern that the client's position in the case will be compromised. A full, candid and confidential exposition of the facts and law, both positive and negative, and opinions, conclusions and concerns about them stated to the mediator, is vital to reaching a favorable resolution.

If counsel tries to "game" the mediator or adversary by hyperbole, omission of relevant information, feigning extreme umbrage, or threatening to leave the mediation, it will usually work as a disadvantage and breed distrust. A savvy mediator knows when this is occurring, and will view counsel with a jaundiced eye. If counsel hasn't convinced the mediator, it will not impress the other side.

Every mediator relies on each party to provide factual and legal ammunition to use in convincing the opponent to make reasonable, substantial compromises leading to settlement. This cannot be done with inaccurate information, or if there is an unpleasant, contentious ambiance in the room.

When presented with your position by the mediator, the other side will recognize gross misinformation immediately, and the mediator's effectiveness and even credibility may be neutered. Not only does this severally reduce the likelihood of settlement, but may permanently despoil the mediator's reputation with the offended party.

It is imperative that counsel confidentially and candidly put all of his or her client's "cards on the table," in the private caucus room, so they may be reviewed, discussed and evaluated. Sometimes, you should speak with the mediator without the client present, if counsel's disclosures may not be understood or well-received by the client.

When a mediator questions your contentions, he or she is not arguing with you, or favoring the opposition, but merely testing their validity to decide whether to use them in the other caucus rooms. Such discussions may reveal that a position is not tenable or reasonable under the circumstances of the case, encouraging you to reconsider and compromise the point. Perhaps you will convince the mediator you are correct, causing the mediator to modify his or her approach to the other parties. Either way, such lively, passionate discussion is necessary to attain the best possible settlement. Of course, professional courtesy and civility should reign at all times.

Do not adopt your client's anger, upset or other emotional distress over the other side's alleged misdeeds. Emotions should play no role in your professional conduct as counsel, as they will accomplish nothing but impair logical and rational assessment of the settlement negotiations, and hinder resolution. Focus only on the best interests of your client.

It is to be expected that counsel will have thoroughly reviewed the case with her or his clients and discussed a realistic settlement range before the mediation. Both counsel and client must appear at the mediation with an open and flexible state of mind. All discussions with the mediator should be considered in good faith. If it is felt it is in the client's best interest to agree to an amount or other provision outside of your prior expected range, be open and willing to agree to it.

Allow the mediator to conduct the mediation. You retained a mediator based on his or her experience facilitating resolutions of complex matters. Your confidence in the mediator should be reflected in your being fully engaged and cooperative in the mediation process. The bane of every mediator is headstrong counsel, who come to the mediation with a preconceived notion of what should occur, and who resist anything the mediator does or suggests that does not comport with counsel's pre-determined approach. Such counsel is not asking for assistance in settling the matter. Rather, they are telling the mediator what to do. More importantly, they are wasting the client's money, as the chances of resolution are almost nil. The attorney should have settled the case on his or her own. Obviously, that was not possible, or they would have done that.

If your client desires to accept a settlement and you disagree, respectfully tell them. If they still choose to do so, honor their decision. Remember, the client, not you, participated in the matters underlying the dispute. Only he or she knows what truly happened. Clients do not always disclose to counsel, or anyone, what actually occurred, due to fear, guilt, shame, embarrassment, or other personal reasons. Sometimes unrelated matters are occurring in your client's life of which you may not be aware, that would make enduring the stresses of ongoing litigation, or an adverse result at trial unbearable.

Settlement is the client's prerogative, not yours. Once you have given her or him your heartfelt advice, it is their decision which should be respected. A satisfied client will return to you for other legal services, and be a reliable source of referrals.

In today's environment of legal specialization, few practitioners are competent at everything. It is better in some tasks to rely on a specialist. In settlements, that is the mediator. Allow the mediator to "perform his or her magic." In this manner you will guarantee the strongest probability of an outstanding settlement of your case.

Don't worry, in the unlikely event it doesn't settle, you will have the opportunity as a superb litigator to "work your magic"…in the courtroom!

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