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Mediation: The New Way to Litigate

BY A. LEE PARKS & JENN COALSON

The art of finding a workable compromise of sharply contested litigation through the use of a neutral is now an essential skill set for any successful civil litigator. Mediation has become the single most powerful tool in a civil litigator's arsenal to resolve lawsuits economically and on terms beneficial to their clients.

Mediation now concludes far more cases than trials. Its increased popularity stems from the fact it empowers the parties to a legal dispute to take charge of their own futures and settle their differences on mutually acceptable terms that mitigates the extraordinary time, expense and uncertainty of traditional litigation.

Mediation succeeds, in significant part, because litigants are generally risk adverse. They fear the unknown. A courtroom is a place of great uncertainty, where the parties must forfeit control over their respective futures to a judge, a jury, or an arbitrator. The plaintiff goes to court as a last resort, and the defendant goes because they have no choice. In contrast, the mediation room is

a venue where the parties usually appear voluntarily and are in complete control of the proceedings. Good neutrals begin the session by empowering the participants to take charge by assuring them that they will ultimately dictate the outcome of the mediation, and that the neutral's role is solely to facilitate a dialogue that will lead to a fair compromise.

Once the parties recognize that they are back in control of their destiny, they usually gravitate towards settlement because it is human nature to eliminate the things that cause you stress. For the parties, that can best be accomplished by resolving the litigation rather than returning control over their collective futures to a gruff judge or jury of strangers.

The tone of the mediation must be set by the attorneys for the parties. They must convey a mindset of conciliation rather than confrontation. Successful mediators know that settlements are more often the product of the parties learning to truly listen to one another rather than talking past each other, which happens when they are still advocating rather than mediating. It is on the broad plane of understanding the opposing viewpoint that you can find that island of common ground upon which a fair compromise can take root and grow.

A mediation succeeds when the mediator can convince the parties to craft a settlement that meets both parties' essential goals. The trick is to get the parties to clearly differentiate what they need from what they want. The parties achieve real closure from a settlement that fixes their respective futures and leaves the past in the past. To do that, the parties have to come to the mediation emotionally ready to put an end to their dispute. That requires effective pre-mediation preparation of the clients by their attorneys. Never let your client come to the mediation cold, without any coaching about the benefits of compromise and the way you plan to achieve settlement.

The most skilled and successful lawyers at mediations know how to weave the non-monetary deal points that are critical to their opponent into their own settlement proposals. It is the constant search for a "win-win" solution that creates the positive mindset that ends in settlement. Traditional advocacy has little place in a successful mediation unless it is within the privacy of a mediation caucus and is intended to arm the mediator with the arguments he or she use to make the other party better understand the claim or the defenses.

[Ultimatums are toxic to mediations. The psychology of a successful mediation is built on the assumption both sides are seeking a solution *that the other side can accept.* That mentality keeps the parties and counsel committed to settlement.]

During the mediation, the plaintiff's lawyer often feels obliged to play their traditional role of trying to maximize their client's recovery even at the expense of a workable compromise. The defense attorney then becomes entrenched in believing that it's their job to get the plaintiff to accept the very minimum it will take to get the case settled. Both lawyers become confrontational instead of working together to pursue a conciliatory strategy where the plaintiff asks for an amount that meets their economic needs and also eliminates the risk of a defense verdict and the defendant focuses on its need to eliminate the risk of a substantial judgment for plaintiff and mitigate litigation costs. Both sides must commit, at least to the mediator, that they truly want to settle the dispute and will insure that their offers communicate that sentiment.

This article offers ten practical pointers designed to help you prepare for a successful mediation which gets your client to "yes" within the parameters of what both sides come to believe, with the aid of a skilled mediator, is a fair compromise of their dispute.

1 When Do I Schedule A Mediation?

The timing of when you schedule your mediation is important. Early mediation affords the parties a great opportunity to settle when fees are still relatively low and more money is available to fund a fair settlement. Significant time and money spent by either side on litigation will generally cause the parties to become more entrenched in their positions. Spiraling litigation costs can either be the biggest barrier to settlement or the best motivator. But, early mediation (i.e., pre-discovery) does not make sense if you don't have all the facts you will need to accurately value your case. You have to understand the strengths and weaknesses of your case to be able to present your most effective case to the mediator. If you opt for an early mediation, I suggest you engage in some basic pre-mediation discovery to insure both sides have the information you will truly need to value the claims.

Schedule the mediation on a date when all decision makers can attend in person. At a minimum, they must be available by telephone or video conference for consultation during the mediation.

2 Selecting a Mediator

The importance of selecting the right mediator cannot be overstated. If you practice in a major metropolitan area, you have a variety of mediators to choose from, all of whom have different experiences, styles, personalities, and approaches to mediation. Generally, a prime consideration is to hire a mediator with a demonstrated familiarity with the substantive area relevant to the claims.

However, subject matter expertise is only one quality to consider. You know your client and your opposing counsel. You want a mediator with the right personality, experience, and reputation to get the case resolved.

Do your homework. Speak with colleagues who have used the mediators you are considering. Most mediators can provide you a list of lawyers who regularly use them to mediate cases. One specific question to ask your colleagues about is the mediator's tenacity: will the mediator give up on the mediation, or will they see the process through and continue to work with the parties even after the mediation itself concludes to do everything possible to get the matter resolved? Some mediations don't settle until weeks, even months, after the initial session. It takes an experienced mediator to keep the parties engaged in a positive way so that frustration does not force the mediation into impasse.

There are evaluative mediators and consultative mediators. Those that evaluate generally have considerable subject matter expertise in the area germane to the case and bring that expertise to bear in the mediation process to aid the parties' value of the claim. A consultative mediator focuses more on the task of facilitating communication of the parties' respective positions so to insure all issues are clearly articulated and done in a manner without rancor or undue advocacy. They try to find closure in facilitating good communication between the parties. In contrast, the evaluative mediator is working to help both sides see how the case might be resolved if they return to the adversarial litigation process. They focus on a litigation risk analysis so the parties get a sense of what might happen if the case was decided through litigation. You need to carefully consider which kind of mediator is best suited for your case.

The selection of the mediator is a great opportunity for counsel to work collaboratively. It can set the tone for the mediation. Do not automatically discount a potential mediator just because the opposing counsel suggests them. You are mediating in the hopes that the case will settle. Using a mediator that you trust and your opponent recommends and respects, makes settlement more likely.

3 Preparation for the Mediation

It takes time and a good bit of strategic thinking to properly prepare your client and the mediator for the mediation. You want to go into the mediation with a definite outcome in mind and a strategy designed to achieve that goal. That being said, don't set a specific settlement amount as your bottom line, but come up with a range of possible valuations tied to proof of certain key facts. Make sure you can connect the amount of your settlement offer to the facts and law applicable to your case. When you can, you improve your chances for settlement.

Consider all the "what ifs" that might arise factually and legally, and walk your client through the various possible outcomes, including full settlement, partial settlement, the possibility of ending the day with negotiations continuing, leaving with a high-low agreement, a mediator's proposal or impasse. If litigation has commenced, take time to explain to your client how the venue for dispute resolution is changing from an adversarial process to one where the parties are trying to collaborate by reaching a mutually agreeable resolution.

Make sure your client is not surprised at mediation by learning, for the first time, that their case is not a "slam dunk." The more the client knows about the process, the better they will react to the highs and lows of a mediation session. Lawyers sometimes make the mistake of assuming their client is familiar with the mediation process. Generally, they are not. You must have very candid conversations with your client about the realistic outcomes of a mediation, and the possible outcomes if there is a trial, should the case not settle. The client must fully understand the downside of an impasse: the time, expense, psychological toll, risk and the possible publicity litigation might generate.

Your client must understand from the outset they will need to make appropriate concessions as the mediation progresses. All too often, the clients come to mediations unaware of the bargaining process, the use of caucuses as a way to progressively bring the parties closer to a deal. The client becomes frustrated by the constant request that they increase, or decrease, their last settlement proposal. So, it is important you involve your client in the strategy of the negotiation so they understand "how the game is played."

Emotions generally run high at mediations. Make sure the plaintiff understands that the neutral means no disrespect by suggesting that your proposal is too high or low. Help your client differentiate between a compromise that settles the case, and the amount that would fully compensate them for their injury of whatever harm they suffered. Prepare them for the likelihood that both the parties will likely start at unrealistically low and high proposals. It is just a part of the process.

4 Pre-Mediation Settlement Proposals

Jump start the process by agreeing with your opposing counsel to extend pre-mediation settlement proposals. This helps minimize the chance that the parties convene the mediation but are not in the same ballpark as to the value of the case. Tie your initial proposals to the evidence and law applicable to your case. Research verdicts and settlements in similar cases to provide some substantiation of your offer. Do not, however, condition mediation on your opposing party meeting some ultimatum as a *quid pro quo* for the mediation to occur. You are just poisoning the well where the settlement might come from

5 Submit a Mediation Statement

As a general rule, you should always submit a mediation statement. It is essential that you educate the mediator. This will make him or her much more effective at the mediation. Include information in your statement that will allow the mediator to understand your client's emotional state and any other external

issues impacting your client's receptivity to settlement. Mediators often hear that the reason an attorney wants the case to go to mediation is that they "need help with their client" to get expectations and emotions in check so they can convince the client to consider a reasonable settlement proposal.

Schedule a pre-mediation phone conference with the mediator to make them aware of any matters you prefer not to put in writing but feel they need to know in order to get a clear grasp of your case and your proposed settlement range.

You should also consider whether it makes sense to keep your mediation statement confidential. Often, the exchange of mediation statements with the other side before the mediation allows the parties the opportunity to more fully evaluate the merits of the case and respond appropriately with countering evidence or case law you may not know about at the mediation. If plaintiffs have economic damages or are seeking attorney fees, they need to be calculated and available for distribution in writing.

6 Organize Your Mediation Team

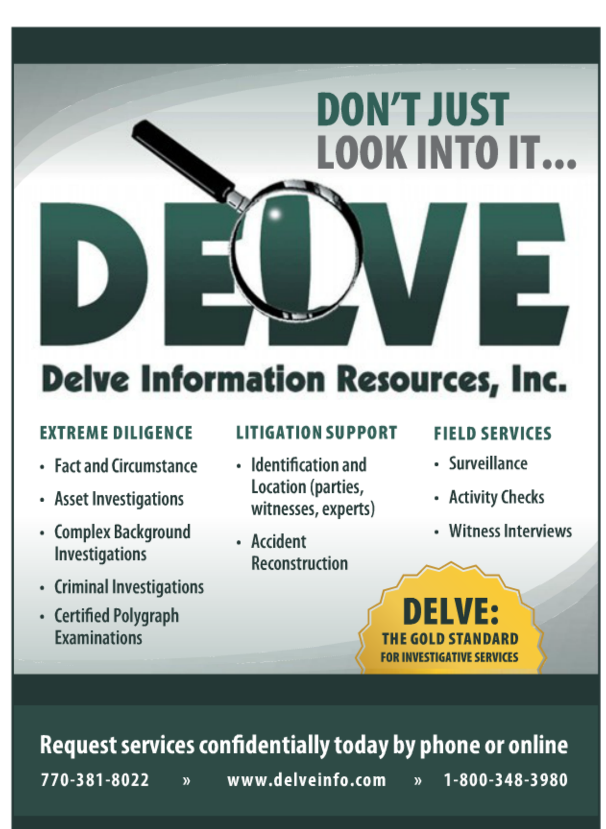
If multiple attorneys attend on one side of the mediation, make sure everybody's roles are clearly defined. Generally two lawyers per side are more than enough. The lawyer with the most client contact should be present as that is the lawyer the client likely trusts the most. Designate one attorney to take the lead in caucus negotiations so you are not speaking over each other, or worse, sending contradictory messages to the other side. Know in advance what documents you should have available, and when to present them.

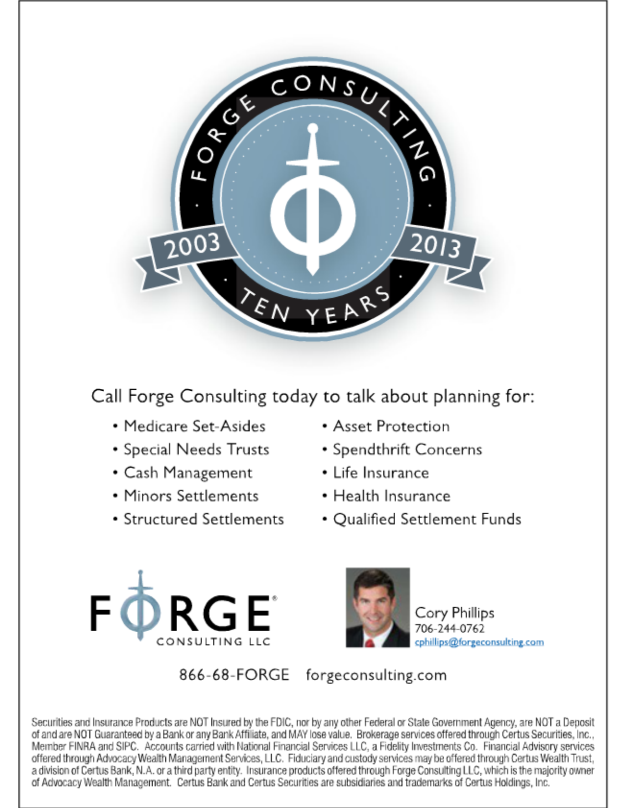
7 Opening Statements: Present Your Most Compelling Case

As a general practice, the lawyers should avoid opening statements as they are usually too adversarial for a mediation. That being said, it can be effective to let your client make a brief, opening comment at the mediation. A sincere and well-reasoned presentation by a plaintiff suggests to the defendant and/or their insurance adjuster that the plaintiff will testify well at trial. The defendant can also use the opening meeting as a way to express a sincere commitment to resolution and express some sympathy for the plaintiff without admitting to any liability. This helps defuse the "demonization of the defendant" that generates in the plaintiff so much emotion.

If you decide you need to make an opening statement, give some real thought as to how to present your most compelling and persuasive case at the mediation without being overly adversarial. During the joint session, avoid attacking the other party or overstating facts, as defendants tend to shut down and dig their heels in when they perceive the other side as being overly aggressive or dishonest.

A polarizing opening statement by plaintiff's counsel seldom increases the amount of the settlement. In fact, it often decreases the likelihood the case will settle at all. Being overly aggressive in an opening statement only makes the mediator's job more difficult. It also causes your





opposing counsel to view you as unfamiliar with the mediation process, to see you as an obstruction to settlement and hurt your credibility.

If you make an opening statement, take advantage of technology to make an effective presentation. A PowerPoint presentation containing images of key documents, or a video allowing the defendant to preview what they could expect at trial, can be powerful and persuasive.

8 Pursue the Caucus Negotiations Positively

One mistake many lawyers make in planning their mediation strategy is they commit to the client to advocate an inflexible "bottom line" number before they ever get to the mediation. Insurance-based settlements are frequently frustrated due to the arbitrary limits set by adjusters who do not actually attend the mediation and therefore do not benefit from the process. Putting control of settlement in the hands of an absentee decision maker can defeat the purpose of mediation, and, in many ways, is inconsistent with the obligation to mediate in good faith.

Tailor your demands at all times to the law and evidence in the case. When presenting subsequent demands during the mediation, legitimize those numbers by expressly pointing out the specific reasons for them. Mediations breakdown when they morph into auctions, and offers and counters become numbers divorced from any objective rationale. Correspondingly, pay attention to the reasons behind the other side's counter offer. And try to incorporate any portions that make sense so settlement starts to meet both sides' needs.

If negotiations bog down after several exchanges, consider using brackets to move things along and narrow the gap between the parties' positions. Your focus should be to agree on a settlement of the claim, not to deliver ultimatums. The party who brands a proposal as "best and last offer" is only increasing the possibility of an impasse.

Don't forget about non-monetary terms. In a mediation the parties have the ability to address issues that would not be addressed if the matter goes to trial. In employment cases, for example, the parties can negotiate what type of reference the employer will provide, continuation of health benefits, non-disparagement terms, and similar issues that can be of great importance to the parties, but not necessarily to a court. More importantly, if there are non-monetary terms that are going to be real sticking points, don't wait until the very end of the negotiation process to raise those issues.

Use your mediator as a resource during the negotiation process. If you have selected an appropriate mediator, you should trust their judgment about how to present demands, whether to make certain concessions, and how particular messages may be received by the other side.

The successful attorney at mediation keeps the mediator in opposing counsel's caucus room. That is best accomplished by having a good negotiating plan, following your mediator's advice, and keeping your client's spirits high. Avoid becoming argumentative with the mediator as he or she is truly a neutral and committed to finding a solution to the dispute.

9 Have Patience and Conclude the Mediation Process with a Term Sheet

If an agreement is reached at mediation, always draft an enforceable settlement agreement, or at a minimum, a term sheet setting forth the material settlement terms (both monetary and non-monetary) that the parties can agree to. Take the time to discuss with your client whether a structured settlement is appropriate, as that is a good way to increase value and minimize taxes.

Mediation is a deliberate process that often seems to go slowly. But a case that settles in one day versus two-plus years of litigation is actually an incredibly fast track for resolution of any legal dispute. Have patience and don't walk away unless it's absolutely necessary. Again, rely on the mediator to advise whether the parties are truly at an impasse. If it is necessary to walk away, discuss whether and when your mediator will follow up with the parties in an ongoing effort to resolve the matter. If particular evidentiary matters are sticking points, consider reconvening at a more opportune time, such as after a key witness's deposition.

10 Avoid Impasse

Ultimatums are toxic to mediations. Avoid proposals that send messages of inflexibility. The psychology of a successful mediation is built on the assumption both sides are seeking a solution **that the other side can accept**. That mentality keeps the parties and counsel committed to settlement. The definition of "winning" in a mediation is compromise. You must keep your client in that mental "zone" or impasse becomes a real possibility.

If the caucus negotiation process bogs down, consider two options: One, adjourn to regroup and reconsider your positions and allow the mediator to continue the process through telephone caucuses; or, two, solicit a mediator's proposal. This is a process that is often successful because it is a settlement recommended by the mediator rather than the opposing party. The parties must respond yes or no to the mediator; there can be no further negotiation.

Conclusion

Mediation is a well-proven process for dispute resolution. Every civil litigator needs to develop skills in this area to effectively represent litigants in an era where the cost of litigation is exorbitant, and most clients are better served by some method of alternative dispute resolution

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