

## **EIGHT WAYS TO IMPRESS YOUR CLIENT AT MEDIATION**

**© Law Office of Patricia Lee Connors**

The American Arbitration Association reports that over 85% of all mediations result in a settlement. This percentage includes disputes where the parties are not optimistic about the prospects of settlement, where prior negotiations have been unsuccessful, and where the parties are already heavily invested in trial preparation. Not only does mediation increase the chances of settlement, it can achieve results which are more comprehensive than the results of a favorable resolution at trial.

In order to take advantage of this powerful tool of dispute resolution, you must be as diligent and prepared as if you were going to a jury trial. The following are eight ways to impress your client and enhance your ability to achieve good mediation results.

### **1. Determine the correct timing for your mediation.**

The proper time for mediation depends upon each case. Generally, mediation should occur as soon as you have sufficient information to make a reasonable evaluation of your client's position. The best time for mediation may be before the case is even filed. Where there is a continuing relationship between the parties, it makes sense to mediate as soon as possible. If your opponent is not willing to mediate early on, look for other windows of opportunity as the case progresses. Mediation on the eve of trial may sometimes be appropriate, but often you can do your client a disservice emotionally and financially by waiting that long.

### **2. Adequately prepare the case.**

Mediation is accelerated, facilitated negotiation and in negotiation knowledge is power. You should be aware of the problems, as well as the strengths of your case. In caucus the mediator will spend significant time exploring with you and your client the potential weaknesses in your case. Listen carefully, as new information about the case may be divulged by the mediator. In responding to the mediator, do not hesitate to point out where the mediator may be incorrect.

One component of the caucus is assisting the mediator in conducting this same process with your opponent. Be prepared to supply the mediator with a view of the facts supported by admissible evidence, and a reasonable evaluation of possible trial outcomes based upon applying legal authority to those facts.

### **3. Be prepared to think creatively about resolution.**

An essential component of preparation is determining your client's interests and to the extent possible, anticipating the interests of the opposing party. Look for ways that both sides can achieve their goals with as little cost as possible to the other side. Is the structure or timing of the receipt of funds an important issue? Does one party have resources or opportunities which may be even more desirable to the opposing party than money? Are there other issues between the parties which can be resolved through this mediation? Your client may be very interested in obtaining a non-monetary goal it could not achieve through successful litigation. Mediation is not limited to discussions about monetary interests. Be prepared to make creative suggestions aimed at focusing on interests, not positions.

#### **4. Adequately prepare your client.**

Preparation for mediation is as important as preparation for deposition or trial. Explain to your client the general nature of the process, including the rules of confidentiality and the non-binding nature of mediation. Inform your client that much of the day may be spent waiting while the mediator caucuses with the other party. Tell your client this waiting time can be utilized to re-examine your position in light of new information.

Have a thorough discussion with your client about your analysis of the case, including the potential pitfalls and weaknesses. Few cases have a 90% chance of success. A client's trust can be seriously damaged if he or she first learns at mediation that there is a real risk of summary judgment or that substantial attorneys' fees and costs could be required to prevail. Anticipate every hard question the mediator will ask, and discuss it with your client beforehand.

#### **5. Make sure the necessary parties will attend the mediation.**

The most important persons necessary to a mediation session are those with sufficient authority to resolve the dispute. One of the biggest frustrations to attorneys, parties and mediators is to reach a settlement in principle only to discover that a party not present or available must approve the proposed settlement. In cases where insurers are involved, it may not be prudent to have them present at any joint sessions. However, they should either attend the caucuses in person or by telephone, or be immediately available. Where large corporations or governmental entities are involved, it is often impossible to have the decision-maker present. Counsel for such entities should inform opposing counsel prior to the mediation about the limitations this will create on the process.

In addition to the parties and those who have the final say on settlement, determine who else should be present. Again in the case of entity defendants, the individuals with the most complete knowledge of the facts may not be parties, but they should be present. Where the case will greatly depend upon complex expert testimony, consider having the expert available.

#### **6. Be prepared for the initial joint session.**

Most mediations begin with a joint session where the mediator explains the process, its confidentiality and its voluntary nature. The mediator may present his or her understanding of the case at this point and may ask if any party or their counsel has anything further to state. This is not the time for an aggressive opening statement. However a well thought-out statement can serve to inform the other party without the filtering of your position through opposing counsel. A brief statement by your client may be appropriate and you should discuss with your client beforehand what statement might be made, and the circumstances under which it should be made. The joint session is the starting point for the resolution of the dispute; utilize negotiation advocacy rather than litigation advocacy.

#### **7. Set aside sufficient time for the mediation.**

For the mediation process to work, clients need time to "vent" and to reexamine positions and opinions they have long held. A give and take negotiation process is most effective and by its nature can be time-consuming. Often, little progress will be made for several hours, but if the parties continue to work hard satisfactory settlement may still be possible.

Let the mediator determine whether the parties are truly at an impasse. Remember, the mediator may have information on a confidential basis from the other party suggesting more flexibility than the “official” position the mediator is authorized to communicate.

#### **8. Be prepared to finalize the agreement.**

Final agreement frequently comes after long arduous hours of negotiation. Before the mediation, take steps to eliminate as much of the work of memorializing the agreement as possible. Discuss with opposing counsel any terms or conditions that must be contained in the agreement. Determine if there are any time frames which must be considered. Draft a proposed statement containing these terms and ask opposing counsel review it before the mediation. Bring your draft on disk or bring your laptop to the mediation.

If you leave the mediation with some terms yet to be worked out, be certain to determine whether the settlement is binding. At times, certain details cannot be resolved at the mediation. In some cases the terms can be set out in a document signed by all parties, with the provision that counsel will prepare the formal settlement documents. Counsel should be certain that the client understands whether the agreement reached is binding or not.

Mediation presents an opportunity to all the parties to create their own resolution to the dispute. Most mediations result in a viable settlement. As counsel, you can maximize the likelihood of a satisfactory result by understanding the process and preparing yourself and your client to effectively participate.