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A Practical Path Towards Better Mediations

By David Lichter, Aventura, Fla.

While every mediation has a different set of facts and legal arguments, they still share many similarities. This is one of my observations during the last 25 years as a mediator and litigator. And while each mediation has its own course and pace, with no One True Path toward settlement, we can glean helpful information from those common characteristics. What follows are

time-tested ways to improve your chance of reaching settlement based upon the similarities.

BEFORE THE MEDIATION

Some of the information handed to your mediator may be dictated by court order (especially in certain federal courts) or your experience with the particular mediator or a mediator's

specific request. I've always found it useful to have, at a minimum, a copy of the complaint; the answer, especially for the affirmative defenses; a damage analysis, if applicable; and, depending upon the matter, some key documents. A summary of settlement negotiations is also very helpful, as is a summa-

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ry that conveys information distinct from the Complaint, particularly a document that identifies the strengths and weaknesses.

Contrary to a common belief, speaking to the mediator in advance can be beneficial. Such communication is particularly helpful if one or more of the parties has personal issues or hot buttons of which the mediator should be made aware.

Many lawyers are used to making opening remarks at mediation. If one side chooses to forego those comments, i.e. to avoid overheating the proceedings, I like to be informed in advance to let the other side know. On many occasions, if one party declines to make an opening, the other side will also forego one.

Pre-Mediation Settlement Discussions - I encourage the parties to discuss a settlement before the mediation if they think it makes sense. It is worthwhile to try to narrow the gap before mediating begins. If you have established some type of floor or ceiling on an offer and/or demand as a precondition to mediation, the agreement should be recorded in writing. The parties are sometimes on different pages in a telephone conversation, and I have attended more than one mediation where one side accuses the



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other of bad faith resulting from a miscommunication, or deliberate deception, depending upon who you ask, between counsel.

WHO ATTENDS

While court orders often require a person "with authority" to attend, that may not always happen. More precisely, someone with some authority usually attends, but the attendee may need to call "upstairs" for additional authority.

Notify the mediator early on in the day if you believe the other side's representative lacks sufficient authority. The

mediator will then have the opportunity to remind the other side of its obligations, and help the parties avoid allegations of mediating in "bad faith" or violating a court order. Or, even worse, with the parties making real progress at 5:15 p.m., the person with the real authority is without a cell phone and on the golf course. Make sure the defendants have sufficient means to reach the "authority" person after hours.

FORMAT

Consider carefully the type of format you will use in presenting your position.

A PowerPoint presentation? An organized three-ring binder? Video clips? A few comments? Obviously every case is different.

Many studies show that people generally recall facts better with information they see rather than what they hear. This would suggest that a PowerPoint presentation or notebook would be preferable to some unadorned opening remarks. But both of these mediums are subject to overuse.

PowerPoint quickly gets boring. So, the best course is to stick to the main points and save the slides for key video clips, documents or charts. In most cases, you should exclude the narrative

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Esteemed employment lawyers led and contributed to this discussion: Joseph Ahmad of Houston, Texas; Jonathan Ben-Asher of New York City; Mary Dryovage of San Francisco; Frank Shooster of North Lauderdale, Florida; Washington, D.C.'s Billie Pirner Garde; and Mark Kleiman of Santa Monica, California. The whistleblower session would not have been a success without the valuable contributions of Adele Rapport, the Employment Rights Section chair.

RETIREMENT ISSUES

Next, we followed that session with a presentation dealing with the legal

issues associated with defective advice to retire and the improper handling of retirement assets. The retiree population has grown substantially over the last few decades. The highly relevant roundtable discussion provided insight into a variety of factors that should be considered in assessing whether financial advice and services provided to retired clients were adequate and appropriate. Joseph Peiffer of New Orleans and Daniel Bateman of Gaithersburg, Maryland led this session.

CROSS-EXAMINATION

Finally, we presented a session on cross-examination that focused on advocacy in arbitration. The session included practice tips for handling experts and adverse witnesses and included video-

tapes showing particular cross-examination techniques. We were fortunate to have, Christopher Vernon from Naples, Florida, a veteran of almost 20 years of commercial litigation experience, who provided insight into how to use videotapes in the examination of witnesses and in presenting a case during closing argument.

Based on the feedback, it's fair to conclude that the attendees received a first-rate program, and the panel discussions were a benefit to everyone who attended.

Next up for our Section is the education program we have planned for the Annual Convention in Chicago. The convention is scheduled July 14 - 18, 2007 at the Hyatt Regency. Stay tuned for more details on our program.

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descriptions, quotes from statutes or rules, or long case citations.

The same is true for the binder. Although you can add additional paper, tabbed, to make you look very prepared while only spending time on a limited portion of the notebook, the effect of an organized presentation is helpful not only to persuade defense counsel, but to let their client know you take the case seriously and are prepared to go trial.

AT THE MEDIATION

Setting the right tone in a mediation is crucial. Setting the wrong tone will move things in the wrong direction and force the mediator to spend valuable time cleaning up the mess.

There are several ways to get your point across during your opening comments without personally attacking the other side as the Evil Empire. Nor should the opening be a re-reading of your complaint. You can assume that the defendants and, hopefully, the mediator reviewed it. So, hit the high points that describe what the case is really about. It is generally more effective to direct your comments to the person on the other side holding the checkbook than the mediator.

Many lawyers prevent their clients from speaking at mediation. Many good reasons exist for this approach. For example, "my client is an unlikable or lousy witness and I don't want the other side to know." On the other hand, if the client is a nice, elderly widow who can make a good impression without saying the wrong thing, you should allow her to speak. The more sympathetic your client appears, the more money you are likely to recover for your client in settlement.

Your First Demand - Except in the rare instance, your first demand should exclude amounts allocated for punitive damages or attorney's fees. It is clear that for most cases, defendants will vehemently decline to pay a settlement that includes these items. If so, they might as well roll the dice and go to trial.

Including those damages and costs in the first demand will usually anger the other side and start the discussions off on

the wrong foot. Moreover, the response you receive will often be as low in the other direction. Starting somewhere south of your maximum number is a better way to start the process on the right foot.

Strategies - Saving some cards to play during the mediation is the right idea in some instances. But don't get so tied up with your litigation strategy that you refuse to play anything in your hand as the parties begin to move toward each other. You can dole the information out slowly, and this will often encourage the other side to do the same.

While free discovery should never be the sole purpose of any mediation, it is certainly a side benefit that often occurs. Assuming you are comfortable with the way the talks are progressing and you trust your mediator, then play that last card if you have a reasonable belief that it will bridge the gap. It is always harder for the mediator to do his or her job if you deliberately withhold the tools for them to work with in the first instance.

And please, do not give up on the process too early. You can continue talking even as you are loading the car on the way to the courthouse.

MEDIATING MASS ACTIONS

Consider a situation where you represent multiple plaintiffs in a "mass action," as distinguished from a class action, but with the same or similar set of operative facts. It is helpful to address logistics with the mediator, and perhaps the other side, although the mediator can do this for you in advance.

My experience has been that a joint session at the outset works best, where the mediator, counsel, and the parties, introduce themselves if necessary, and then discuss the mediation process generally. If the counsel wish to make some opening remarks, they should generally stick to a review of the facts common to the claims or defenses, and then save the individual particulars for the caucus.

You can decide in advance whether some plaintiffs ought to be grouped together, or determine the order their individual claims should be negotiated. I strongly recommend starting with the easiest-to-settle first, to build a settle-

ment momentum.

Each additional plaintiff added to a group often dramatically increases the amount of time it takes to settle the cases. Therefore, it is important to properly prepare your clients to cool their heels for extended periods of time in multi-party mediations. Get the cell phone numbers of the plaintiffs not currently negotiating and stagger their return, i.e. after lunch or the following day. Call them periodically so they don't return before you are ready for them, so that they feel included and engaged in the process.

While some defendants in multiple plaintiff cases may try to offer a lump-sum monetary settlement, most will retreat once the plaintiffs' counsel raises the potential ethical dilemmas that these offers pose for counsel in dividing settlement proceeds.

THE SETTLEMENT AGREEMENT AND POST-MEDIATION

To the extent possible, try to execute a complete settlement agreement and release at the mediation. This avoids "buyer's remorse" on either side as well as extended lawyer haggling over usually meaningless distinctions. If your client's English is poor, make sure the settlement agreement contains a line at the end in his or her native language that the agreement has been translated and that he/she understands its contents, and require the client to initial next to that paragraph.

Although a case fails to resolve at mediation, an opportunity still exists to settle later. Good mediators will periodically check with you following an unsuccessful mediation to determine whether they can assist in getting the case resolved and will work with both sides to try to bridge the gap. Don't give up!

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