How to get What You Want in Mediations: Prepare Yourself Procedurally, Substantively, and Psychologically

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Preparing for mediations requires much more than evaluating legal and procedural issues. It's critical for attorneys to balance the four hats they wear: advisors, advocates for justice, negotiators, and evaluators of proposed settlements. To do this, attorneys must begin by preparing themselves procedurally, substantively and psychologically – starting with their attitudes. A great deal of time, money and angst can be saved by investing a little more energy upfront focusing on aspects that often don't receive the attention they require.

Most cases really do settle at mediation or shortly thereafter. Attorneys are infinitely more likely to achieve their desired outcomes if they and their clients enter the process ready to settle. Too often, people come into mediations thinking, "This is never going to settle." I often hear that phrase either in the morning, only to watch settlements occur that afternoon. Rather than focusing on the likelihood of an impasse, attorneys should spend time envisioning a variety of outcomes and discussing these in detail with their clients well in advance of the mediations. It's like anything else in life: If you don't have a concrete end goal in mind, you are not likely to achieve it.

In addition to understanding the legal arguments supporting and opposing every cause of action, attorneys also need to be familiar with the pleadings and procedural events in the cases, as these issues arise more frequently than you might think and attorneys often are caught looking unprepared in front of their clients. And yes, attorneys should make sure to remember who the Judges are, whether, whether the cases are bench or jury trials, and whether and when the cases are set for trial. You might be surprised how often attorneys are unaware of this basic information about their case.

Attorneys also should understand the damage calculations. He or she who controls the numbers at mediation often controls the mediation. Attorneys should make sure they understand how they and the other side reach their conclusions about damages, and the flaws in the opposition's analysis. If you don't understand their calculations, ask. If you have a damage analysis or profit and loss statement, consider sharing it with the other side (or at least the mediator) beforehand to make the mediation a more efficient process.

Next, attorneys must prepare their clients. Every client is unique and there is no cookie-cutter approach to follow, so it's critical for attorneys to take the time to understand their clients, their unique backgrounds, and what they bring to the table. For example, do they need a fuller explanation of the process? Do they have an expectation – realistic or otherwise – of what their attorneys should be doing at mediation? Do they need handholding? Just as important: what are their hot buttons, and are things so emotionally charged that both parties can't meet to explore options or at least jointly listen to opening remarks from the other side?

Attorneys must prepare their clients for the "Kabuki Dance" of mediation – the sometimes theatrical, and not infrequently elaborate song and dance required to move the other side (and their own clients) from point A to point B. Rather than relying on mediators to do everything, attorneys should keep in mind that they and their clients are equally responsible for guiding what is often a non-linear process through to resolution and should take a proactive role in doing so.

Another key psychological aspect is comfort-related. It's important for everyone in the room to feel as much at ease as possible and to trust in the integrity of the process, as people who feel comfortable are more likely to be more receptive to compromise and settle. Location may play a major role. Attorneys should work to understand whether their clients will believe that selected locations are not "neutral'; it's critical to avoid any last-minute skirmishes about where the mediation will take place. In addition, it's important to anticipate any issues related to traveling to and from the mediations, particularly when participants are arriving from out of town. Also, lawyers should assume – and should tell their clients – that mediations often take much longer than expected and lawyers and clients should develop plans for handling the "dead" time (whether it is working on discovery-related matters, reviewing strategy, or encouraging clients to bring an iPad, laptop or even good a book to read) while one or both sides wait to consider proposed settlements. They also should advise clients on how to dress for mediation, remind them not to play with their phones during opening remarks, and make sure to eat well beforehand and keep the necessary infusions of caffeine going to stay alert and engaged. It's helpful for clients if their attorneys retain an optimistic outlook –positive energy goes a long way toward achieving desired outcomes.

Preparing clients also involves discussing the possibilities of settlement, including the necessity of "giving something up" to reach agreement. Clients also should be aware in advance about the fees connected with preparing for and attending the mediation. More importantly, they should certainly have an idea of the "road ahead" both in terms of time commitments, fees and expenses if the case does not settle at mediation. Throughout the many years I've worked as a mediator, I've observed that attorneys who spend the necessary time upfront preparing themselves and their clients are much more effective in achieving their desired outcomes while at the same time helping their clients minimize much of the angst that often is associated with mediations.