

Mediation Advocacy— Winning the Negotiations

By John M. Noble

The “art” of advocacy in alternative dispute resolution.

Many attorneys have been asking themselves a question lately, namely, “how do I learn to mediate a case?” This article will hopefully assist you in learning some mediation basics—how to choose a mediator, how to prepare your client and how to conduct yourself at a mediation session.

Choosing the *right* mediator.

There is no crystal ball when it comes to choosing a mediator. While you currently don't see mediation advertisements at the same level as legal advertisements, rest assured that “mediation mania” is coming your way.

Word of mouth continues to be the best source of referrals, whether for a particular attorney, expert, arbitrator or mediator. There is some debate over whether or not a particular type of case requires a mediator with specific expertise, such as a patent law dispute.

While some attorneys are more comfortable with mediators from a specific field, most people look to the mediator's effectiveness and not the particular subject matter because mediation is about people, managing expectations and the presentation of resolution benefits versus risk. While most would measure the effectiveness of a mediator by results, like anything else, you learn by way of trial and error the mediation style that best suits your personality, case or practice.

Preparing your client for mediation

Most attorneys tend to focus on their mediation presentation and negotiation strategy, spending little time and effort in preparing their client—mistakenly placing too much importance on their participation in the process. In most instances, however, the claims adjuster or insurance representative attending the mediation has never personally met the plaintiff, his or her family members nor any witnesses. This very important person in the evaluation process—the person who writes the check—usually comes to the mediation with perceptions of the client based only upon reports, the medical records and/or expert opinions. The adjuster's first impression makes preparing the client all the more important.

In a typical mediation, the mediator may ask the plaintiff if there is anything they would like to say regarding the attorneys' presentations. It is often obvious that there has never been any

discussion between the client and counsel regarding such an open-ended inquiry and—all too often—the unprepared attorney interrupts his all-too-eager-to-speak client directing them not to respond, missing a great opportunity for the client to present himself in an open and honest fashion. This brief and seemingly insignificant offering by the client can often make the difference in whether or not the case settles.

Believe it or not, the plaintiff's likeability is a subjective boost to a claim in terms of value. However, this same tightrope can quickly devalue a claim. Thoroughly discussing the possibility of open-ended questions with your client may result in your client receiving the benefit of any and all doubts.

Mediation decorum and practice

While each mediator has his or her own particular style, in most instances, the mediator initially welcomes the parties with introductions. Typically, parties dress as though appearing in court. While the conversation is certainly less formal than a courtroom, courtesy and professionalism should always be maintained despite the less adversarial setting. Attorneys must not forget that the mediation session is the client's perceived day in court. Counsel should never treat the mediation process so as to render it *just mediation*.

Once the mediator convenes the session, parties typically sit across the table from each other while the mediator explains the “process.” Some mediators will present an outline of the case and issues presented. In most cases, however, plaintiff's counsel will be requested to present a case summary. On occasion, the presenting counsel will provide more of an opening statement and present the case by way of PowerPoint. While unusual, there are occasions where the plaintiff will make no presentation of the facts or underlying claim during the joint session. I recently read that an attorney should be able to describe their case in one sentence. While this may be extreme, mediation presentations on behalf of plaintiffs typically last no longer than 15 to 20 minutes.

For defense counsel, the opening presentation is often deferred to promote conciliation. In the personal injury action, for example, it is not unusual for defense counsel to defer any opening statement or summary. More often, however, the defense will acknowledge whether or not liability is

admitted, in addition to outlining any and all intended defenses. More and more frequently, counsel will carefully apologize on behalf of the client for the particular event or injury while tactfully explaining their adversarial role and purpose as defense counsel.

Depending upon the type of case, some back and forth may follow and, more often than not, the mediator will ask the claimant for any input. This is the first time that the client will be observed by the opposition and the client should be prepared to engage the captive audience.

At this point, the mediator will typically separate the parties and meet with each party privately to discuss their respective positions in frank detail. These communications remain confidential unless the parties authorize the mediator to pass along the information. The mediator will caucus with the parties to identify issues and work with the parties to reach an amicable resolution. The session could be terminated at this point if the

mediator determines that the parties are unrealistically divided or that there is more work to be done before meaningful negotiations can continue.

In the event that a settlement is not achieved, the mediator will generally reconvene the parties, discuss the issues that remain in dispute and encourage the parties to fully consider any progress achieved in the hopes of continuing to work further toward a resolution. Should a settlement be reached, some mediators will request the parties to "sign off" on an agreement to settle the claim in principal with closing documentation to follow as prepared by respective counsel. Typically, at the end stages of the negotiations, the issue of whether or not one party will pay for the mediation, as opposed to splitting costs evenly, will be raised. If one party agrees to pay for the mediation, that acknowledgment is incorporated in the settlement agreement.

Still haven't mediated a case?

Hopefully, the above discussion will assist you as you enter the world of ADR. Just as you learned to handle your first file and try your first case before a jury, it is a learning process no different than the first time you sat on your first bicycle so many years ago. At first it may be a little scary and there may be a few bumps along the way but, pretty quickly, you get the hang of it. Once you find success in mediation, you will likely join the ranks of those who have pulled me aside as a case was wrapping up, already thinking ahead and saying, "John, I got this *other* case I think should be mediated ..."

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