VERDICTS & SETTLEMENTS

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ALTERNATE DISPUTE RESOLUTION / GIG KYRIACOU

Get Ready

Attorneys who are well-prepared are likely to achieve success in mediation.

Mediation has a demonstrated track record for achieving binding resolutions in a high percentage of cases while at the same time providing parties with the flexibility to achieve more appropriate solutions to their legal disputes. Over 80 percent of the voluntarily submitted mediations result in settlement, according to the 22nd Annual International Conference Report of the Society of Professionals in Dispute Resolution. This article serves as a guide to help attorneys achieve more favorable resolutions for their clients through mediation.

Pre-mediation preparation. Given the high likelihood of resolution, the importance of preparation should go without saying. While no one would consider going into trial unprepared, a surprising number of attorneys and their clients approach mediation in such a fashion. As a result, the unprepared often end up receiving too little or giving up too much. At a minimum, an attorney should prepare for mediation by doing the following:

First, advise the client about the process, including the stages of mediation, its nonbinding and confidential nature and the role of the mediator. Even sophisticated clients often do not fully understand the mediation process and the various opportunities it provides.

Second, submit a brief that addresses those issues, facts, legal disputes and practical matters pertinent to the mediation. Absent complex legal or factual issues, the brief need not be long and it need not be formal. If helpful, provide the mediator with applicable pleadings and exhibits.

Third, prepare the client for her or his role at the mediation. Just as with trial, the client's appearance and presentation are persuasive. The manner of dress and the manner of speech of each client should be discussed. The client should never argue, behaving as if he or she is before a jury. Attorneys should advise clients as to their level of participation, including how to respond to likely questions from the mediator or the opposing party, who to face when speaking, and when not to speak. When counsel represents a company or multiple individuals, a determination should be made as to who will best represent the client given the foregoing criteria.

Finally, realistically weigh the alternative of settlement versus litigation. This includes evaluating likely results, costs of going forward, emotional toll involved in litigating, ability to collect on a judgment and control over the ultimate resolution. In making this evaluation, an analysis should be made of each party's true interests. What is each side seeking to accomplish? This allows the parties to be more creative in seeking solutions.

The mediator's role. Although the mediator has no ultimate decision-making authority, he or she is a powerful tool in the settlement process. The mediator helps each party evaluate the strengths and weaknesses of his or her case and look realistically at the available alternatives. Thus, it is important that counsel and parties do everything in their power to build trust and credibility in their case with the mediator.

The parties' opening statements. The opening statement provides each side with a golden opportunity to present his or her case directly to the opposing party and a neutral party- the mediator. Since the ultimate decision-maker in mediation is each party, alienating the adversary makes no sense. Attacking the opposing party's integrity, ridicule and personal attacks will do nothing to increase the chances of a favorable settlement. Attorneys and their clients should treat the opposing side as they would treat the judge and jury. The facts and legal arguments can be set forth with conviction, even forcefully, but always tempered with respect.

A persuasive opening addresses the relevant issues in a simple, cohesive manner. Counsel should demonstrate preparedness and present the client as a very credible witness. Counsel should summarize the client's case and address the pertinent legal issues. The client's role is to tell the story.

Active, responsive listening. A willingness to listen and respond to the issues raised by the opposition is of utmost importance. Experienced mediators recognize the importance of providing each party with the opportunity for a full airing of their issues, grievances and positions; they will encourage this during the opening statements. It helps to identify the issues and to search for the true, sometimes hidden, interests of the parties. If the opposition fails to pay attention, interrupts or is easily distracted during the other's opening remarks, he or she will alienate the parties. But if the parties listen to and address the concerns of the opposition, this will build trust and credibility, which are extremely useful in achieving resolution. This is not easy. It involves appropriate body language and eye contact. If the opposition believes positions and concerns have been given due consideration, he or she will be more willing to listen to those facts and arguments that challenge such positions.

Counsel and clients who understand that people undoubtedly will have varying perceptions of the same events and acknowledge and respond to those differing perceptions will be ahead of the game.

In some cases, a timely apology for the injuries or losses suffered (without any admission of liability) may assist in achieving resolution. Acknowledging the other side's position does not mean that it has to be accepted, only that it has to be addressed.

Negotiating through private sessions. During the opening statements, a party should avoid discussing dollars where possible. The mediator may well ask about settlement offers to date, but these should be addressed in general terms. The opening should be used to raise or lower general expectations while building credibility in the client and his or her case.

Because it is difficult to build credibility with the opposition while asking for a large amount of money or offering next to nothing, it is best to leave money matters to

the private sessions where strategies can also be discussed. These private sessions with the mediator provide attorneys and their clients with a number of valuable opportunities.

First, the parties can discuss matters that they do not yet wish to disclose to their adversary. This may be the evidence or legal theories of which the other side is not yet aware. They can discuss with the mediator if disclosure will assist them in reaching an acceptable resolution and, if so, when such disclosure will have its maximum impact on the negotiations.

Second, mediation allows each party to obtain an evaluation of the strengths and weaknesses of his or her case from an informed, neutral party. Reality-testing is a key function of the mediator. Experienced mediators will raise questions and concerns as to positions adopted and discuss potential solutions to difficult issues.

Third, successful mediators are skilled at using or diffusing emotions and addressing difficult personality issues. Often the greatest impediment to settlement is a difficult client with unrealistic expectations. Clients will not accept an adversary's version of the realities of litigation. Some clients will not even accept rational advice from their own attorneys, whom they perceive as weak for proposing a settlement that involves less than total capitulation. Indeed, clients often look to their attorney as a "hired gun" whose job is to destroy the other side, not simply to obtain a successful resolution. This is especially so in emotionally charged disputes. On the other hand, a mediator who has provided that same party with an opportunity to tell his or her story and demonstrated a full understanding of the issues is much more effective at conveying the realities of litigation.

Finally, even though negotiations through private sessions have a number of advantages, attorneys should not refrain, when appropriate, from seeking joint sessions with all parties or meetings involving some or all of the opposing counsel. For example, apologies almost always should come from the client, and complex legal positions are best explained by and between the attorneys. Similarly, brainstorming for creative solutions is often best accomplished with the involvement of all parties, especially in cases involving business or partnership disputes.

Negotiating numbers and terms. One of the most common mistakes plaintiffs make in mediation is demanding large, outrageous dollar amounts without reference to any basis in law or fact. This is usually met with contempt and an equally outrageous counteroffer. Moreover, outrageously large, round numbers not tied to some ascertainable standard are simply not credible and typically convey a willingness to move downward in large, round numbers. Conversely, a defendant's refusal to offer anything, even when the circumstances warrant it, only leads to frustration and impasse.

A credible offer is tied to some objective criteria. These criteria could include verdicts and settlements in similar cases; a reasonable percentage of the total damages based on the likelihood of success at trial; standards used in the particular industry; litigation costs; and collectibility.

Parties should avoid round numbers whenever possible. If the special damages add up to $312,552, then the offer should be based on such figure, especially where the calculation can be documented. From there, the likelihood of success can be factored in, as can the possibility of additional general or punitive damages and the costs of proceeding to trial. Just as an expert's opinion is only as good as the underlying support, a settlement offer is only a credible as the basis upon which it is drawn.

Further, attorneys must be careful to involve the other side in working out the final details. At times, settlements close at hand are lost because one party with leverage

attempts to dictate all the terms. The other party's fear of losing face or not having any involvement in the final terms can result in an irrational backlash. Even when one party has the stronger hand, the opposition's advice and involvement in the final settlement terms should be sought. This might involve such issues as whether the agreement should be confidential, the timing of the settlement payments or who prepares the settlement documentation. Allow the opposition some opportunity at the end to choose settlement in lieu of being backed into litigation.

As familiarity with mediation improves, its use is likely to grow. More disputants will take advantage of the opportunities and the high resolution rates it provides. It is therefore incumbent upon attorneys to educate themselves and their clients on the mediation process and the opportunities and risks involved. Attorneys who approach mediation prepared tend to achieve much more favorable results for their clients.