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Maximizing Your Client's Effectiveness In Mediation

BY ROBIN GISE

Unlike in many phases of litigation, mediation is a process in which clients can participate. But what actually happens at the mediation? In many cases, when lawyers spend a lot of time discussing the merits of their client's legal theories and settlement strategies with the mediator, the client is left sitting on the sidelines.

This article explores ways that clients can be more involved in a mediation, including in pre-mediation planning and at the session itself. Ideally, clients should be just as invested and engaged in the mediation process as they are in their claims or defenses in a given case. The lawyer plays a critical role in this regard, not only in preparing a client for mediation, but also in orchestrating the right role and involvement for her client at the session.

It goes without saying that every case has different dynamics and different players, and there is no formula for client involvement. Indeed, there may be cases where the client should have less involvement at the mediation. However, there are several issues to discuss and consider with your client.

Pre-Mediation Planning With Your Client

Help clients identify their interests, not only their positions. How can lawyers help their clients prepare for mediation? Whether it is court-ordered or a voluntary mediation, it is critical that the client understands that mediation involves a compromise. The tension is that the client has hired the lawyer to be her zealous advocate, and is now being told that she will be asked to walk away with something less than desired. To that end, part of the preparation should include a

ROBIN H. GISE is a JAMS neutral based in New York. She specializes in mediating business/commercial, employment, insurance and construction disputes.



discussion of the client's interests in the dispute, meaning why they want what they want.

The following story demonstrates how powerful this can be: A plaintiff in a mediation of a claim against a nursing home told his attorney that he wanted a million dollars and nothing less to settle his claim against the home, whose poor care of his mother allegedly caused her death. However, there was no chance that the nursing home was going to pay a million dollars, as the evidence did not clearly establish that the home's treatment of the mother, who was already quite ill, resulted in her death. When pressed by his attorney on why he wanted a million dollars, the client admitted that he felt so bad about putting his

mother in that home, that he believed that only a million dollars would make him feel as though he appropriately valued her life. Only after the client articulated these concerns was he able to meaningfully participate in the mediation.

Success at trial or arbitration is not the only basis on which a client makes a decision to resolve a matter. It is important to discuss with your client any non-legal considerations that may influence his or her decision to settle. Does your client face significant financial obligations unrelated to the dispute? Is your client concerned about the publicity associated with the dispute in the event there is a lawsuit? Is your client prepared for several years of litigation, financially and emotionally? How would

your client do on the witness stand? In a recent employment mediation, an employer's lawyer told me that even though she considered the plaintiff's case to be weak, having the employer depose if the litigation continued would be so detrimental that it was worth paying more to settle the case. To be sure, there are some cases in which the only interests are monetary and there are no considerations that influence your client's thinking other than success in a future proceeding. However, it is important that your client be able to articulate what she is hoping to achieve in mediation.

Who will attend (or should attend) the mediation? While there are cases in which you will not have a choice as to whom attends the mediation (or it will be quite obvious who will attend), if you do have some control, it is worth thinking through and discussing the options with your client. If you are representing a business or an organization, consider if there is someone who not only has knowledge of the facts, but may also possess personality traits or other knowledge that may be helpful in mediation. For example, in a recent mediation involving real estate interests, one of the attorneys told me that she wished she had brought the vice-president of the board who had a legal background and a more down to earth personality instead of the president who not only did not fully understand the legal issues, but was also quick to anger. She believed that had the vice-president attended, the case would have been more likely to resolve.

As for who should attend from the other side, consider who the decision-maker is. If your client has a relationship with the decision-maker, can that be used effectively at mediation? Or is it better if they stay in separate rooms for the day? If there is someone on the other side who your client thinks would be helpful at the mediation, suggest to the other side's lawyer before the mediation.

If there is insurance involved, find out whether a representative from the carrier will be present at the session. Whether the carrier's representative will be present or only available by phone, consider how much the representative knows about the case. If you are representing a client with insurance coverage, evaluate whether it would be helpful for the carrier to hear from the plaintiff directly to assess credibility and/or how that person would do as a witness.

How to address a continuing relationship between your client and the other side. It is also important to consider whether the dispute contemplates a continuing relationship between the two parties, such as a business or employment relationship. If the parties want to continue

to do business or work together, having your client play an active role in the mediation may help convey to the other side that she or he is interested in continuing that relationship. In fact, it is not always clear whether a relationship must end. For example, in the settlement of an employment matter, part of the resolution included the former employee doing some consulting work for the employer, something that would not have been contemplated until both sides fully discussed with their attorneys what they were seeking in a resolution.

The Client's Role at the Mediation

Consider whether an opening statement by your client would be productive. Having fully discussed and considered with your client what he or she hopes to achieve in mediation and made sure the right people were attending, you will be in a much better position to determine what role your client should play at the session. Mediation is theater. While the lawyer has an opportunity

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to shine in mediation, your client is the star. If your client would be comfortable speaking at a joint session and would advocate effectively on her own behalf, it is worth preparing her to do so. Of course, if your client is painfully shy or has personality traits that would not present well, then he or she should not speak at a joint session. Your judgment on this issue is critical.

Many lawyers assume that they should make the opening presentation like an opening statement at trial. And in some cases, an opening focused on legal arguments may be appropriate as long as it does not antagonize the other side. But the advantage of mediation is that you have the flexibility to decide who will have the greatest impact on the other side. If you make a presentation on legal arguments, your client could follow with a statement about the business or personal impact of the case. If your client does make an opening statement, however, make sure it is productive. For example, while speaking about the impact of the claim on someone's personal life or business can be compelling, accusations and adversarial statements will likely alienate the other side. If your client wants to express such comments, he or she can do so in a private caucus with the mediator.

Notably, just as it may be valuable for the other side to see your client in action, it can also be valuable for your client to hear the other side's case from the principal rather than only from the lawyer. In a mediation involving a mass layoff, the employer's apology to the employees at the opening session helped diffuse the employees' anger and set a tone for productive negotiations.

Would a face-to-face meeting between your client and the other side be valuable? Although private caucuses with the mediator are common in commercial mediation where the discussions focus on money and legal issues, having different parties come together can be effective as well. In addition, even if the parties hold private caucuses after the opening session, they can meet together later in the session. If caucusing is not producing progress, a change in format, such as having certain participants meet together, can be helpful.

Interestingly, private caucuses can allow parties to take tougher stands than they would in direct negotiation. Attorneys can end up relying on their legal arguments like armor in battle, and fail to make progress. In a recent mediation, the parties were more than \$500,000 apart after a morning in separate caucuses that focused primarily on the merits of the plaintiff's legal claim. Frustrated by the lack of progress, the decision-maker on the defense side asked to speak to the plaintiff privately. They had worked together for some time and had some respect for each other. Rather than discussing the merits of the legal claim, they discussed what they each needed to resolve the case. Both had long histories negotiating business transactions and treated this as another deal to close. After a half an hour, they reduced the gap considerably, paving the way for an eventual settlement. A caveat in these situations, however is that your client may make a proposal without having discussed it with you first, which can make future negotiations difficult. If possible, discuss with your client ahead of time what, if any, proposal he or she plans to make.

In short, while there is no prescription for client involvement in mediation, there are certain factors to consider when preparing for mediation and in deciding what role your client will play. Making sure your client is engaged and prepared to be an active participant, whether making an opening statement, engaging in a face-to-face discussion with the other side, or maintaining a quieter role, can be critical to achieving a resolution.