

How to prepare your client for mediation BY GLEN SCOTT LOVE

Attorneys approaching mediation know the basics for case preparation. Ensure that all necessary discovery has been completed to allow the parties to fairly and objectively evaluate the case. Conduct a complete exchange of documentation with the other side so that everyone is working from the same set of information. Prepare a position paper to the mediator outlining your case. These steps are critical, but perhaps the most important step in the mediation process is often overlooked: preparing our clients for mediation.

1. Explain the process

As lawyers, we have a certain comfort level with the mediation process born of experience. We understand the stages of mediation from the opening session when all parties are together, to the caucuses and to that almost certain period of frustration during the mediation when it appears to be an exercise in futility. However, our clients are often completely unfamiliar with what will take place on this very important day.

The first key opportunity that we have to prepare our clients is to visit with them at some length prior to mediation to explain how the process operates. Clients need to be informed that the opening statement usually takes place with all parties being present and all parties having an opportunity to speak freely about the case. They need to know that at this opening session they may hear some information that is unpleasant to them and challenges their view and understanding of the case. Preparing the client to hear unpleasant news during the mediation can be critically important in how they receive that information and whether the process will conclude successfully in a settlement.

The next essential part of preparation is to explain to the client that the process itself is confidential. As a part of the confidential nature of the process, we may have sensitive areas of the case that we do not want disclosed to the other side, but will discuss with the mediator, and the client needs to have a firm understanding of those issues. Similarly, the attorney and client may not want to disclose certain aspects of the case to the mediator, and a pre-mediation conference is vital to identify and explore those areas.

Most importantly, the client needs to be prepared for the inevitable frustration that will take place. As lawyers, we are

trained to be able to argue both sides of the same case, but our clients seldom bring that ability with them into a proceeding where they may have a strong emotional connection to the issues involved. Therefore, we need to prepare our clients for a process that will result in identifying both strengths and weaknesses of the case, so that a fair conclusion and settlement can be reached.

2. Identify problems

By the time mediation rolls around, as the attorney, you probably have a good grasp of the problem areas of your case. Your client may not understand those problem areas or may be in denial as to their existence. A pre-mediation conference is vital to begin laying the groundwork for issues likely to be encountered.

This problem-identification process will also be revealing insofar as client attitudes. Some clients may take a very sanguine view about the problem areas of their case and be able to receive the information and understand how it impacts the case evaluation. However, other clients will not have this ability and a discussion of case weakness may often be met with either resistance or outright denial.


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A pre-mediation conference with the client to explore these issues is instrumental in identifying areas of the case where an impartial mediator can be of assistance in helping the client understand weak spots in the case.

3. Identify expectations

If settlement decisions were the sole responsibility of the attorneys, virtually every case would be settled. The lawyers are able to, for the most part, impassively evaluate the strengths and weaknesses of their cases and reach a fair resolution. Clients generally do not have this ability to detach themselves from the case and review it dispassionately.

More critically, clients often come into mediation with expectations as to what they would like to achieve out of the case. These expectations often have no relationship to the facts of the case or a fair evaluation of the case's true value. As a lawyer, it is essential to know this information going into the mediation to once again be able to solicit assistance from the mediator in areas where a client's expectations may be unrealistic and unachievable.

4. Role of the mediator

The mediator is not the judge. As lawyers, we fully understand this concept, but clients may be confused about the mediator's role.

In addition to explaining how the process will work and the inherent frustrations, the client needs to appreciate the mediator's role. You can make it clear that the mediator is an impartial participant who is present solely to help bring the parties together to avoid the courthouse. Clients need to understand that the mediator will be presenting to them unfavorable information about their case, but in presenting that information the mediator is not agreeing with the arguments presented by the other side (at least not most of the time), but only making the parties aware of what could happen and what conclusions could be reached by a judge or jury.

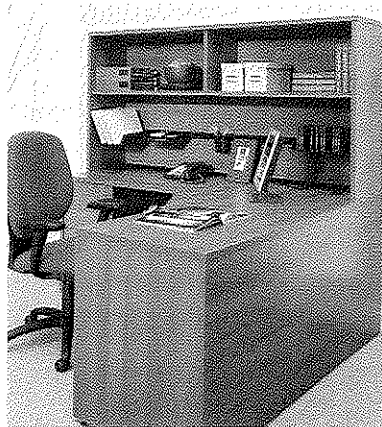
One of the factors in a successful mediation is a client's trust of the mediator. Clearly the mediator's demeanor and personality is important in creating that bond of trust, but the groundwork can be laid prior to the mediation in helping the client understand the mediator's job.

5. Conclusion

Our goal in every mediation is to efficiently bring resolution of a dispute to the parties. In accomplishing that goal it is critical to understand where our clients are coming from and identify any misconceptions they might have. A thorough pre-mediation conference can greatly enhance the ultimate success of the entire process.

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