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MEDIATION

Prepare for a successful mediation

By Bryce Bennett Jr.

Mediation offers something for everyone: Plaintiffs with legitimate claims have an opportunity for early compensation. Defendants exposed to an adverse judgment can promptly eliminate their contingent liability. Insurers can liquidate their indemnity obligation, terminate defense costs and close their files sooner. Effective mediators can develop a new and lucrative practice area centered on dispute resolution and promote civil justice by clearing overcrowded court dockets. Judges are better able to concentrate their resources on adjudicating only the most stubborn cases.

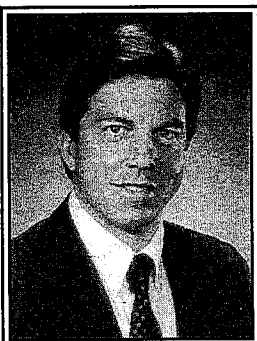
But mediation does not deliver these results without hard work and careful preparation by everyone involved in the process. Participation in mediation will only add to the cost, expense and risks of litigation if it is entered into unwillingly, prematurely or without the appropriate preparation. Because the value of mediation is now well known to seasoned litigators and claims professionals, unwillingness to participate should no longer be a problem. Too often, however, the importance of timing and preparation for mediation is overlooked.

Alternative Dispute Resolution Rule 2.2 provides that a court may select a case for mediation at any time 15 days or more after the period allowed for preemptory change of judge has expired. This should be 10 days after the issues are first closed on the merits. Although early resolution of litigation is the desired result of mediation, the preparation necessary for a successful mediation can rarely be accom-

plished within 63 days.

1. Gather evidence

Prior to mediation, the material facts of the case must be investigated and recorded in a form that is admissible into evidence at trial. Although the necessity for factual development of the case may sound so fundamental that it should go without saying, it is surprising how often a skilled mediator will raise factual questions which could materially affect the value of a case and neither side has gathered evidence to address the issue. This realization not only reflects poorly on the diligence of counsel, but it significantly diminishes the probability that the case will settle at the mediation because prudent decision-makers are understandably unwilling to buy the proverbial "pig in a poke."



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ADR Rule 2.10 expressly provides for the deferral of discovery pending mediation. In addition, although ADR Rule 2.12 provides that statements made in mediation are not admissible, evidence otherwise admissible is not excluded merely because it is presented in the course of the mediation process. Moreover, the rules do not prevent using statements made at the mediation to lead to the discovery of other admissible evidence.

These rules create a temptation to use mediation as a discovery tool. This temptation should be avoided for several reasons. First, there is no way to confirm the veracity of statements made by counsel and parties at the mediation, so the information gained in that forum is of little value in resolving the claims that day. Second, if the case is not going to settle, it will be necessary to record the information in admissible form at a later date anyway, and those efforts may not be as effective if

an opponent has already been educated through the mediation process.

2. Know the law

Mediation is a supplement to, not a substitute for, jurisprudence. The same law that the court or jury will apply at trial should govern decisions at the mediation. This requires that the well-prepared advocate research and understand the applicable law in advance and be prepared to persuade the adversary and the mediator of the effect it will have on the outcome of the case.

Although most mediation facilities will have a law library available for emergency use, this is not the opportune time to perform a considered analysis of legal issues. Not only will tardy and hasty research reflect adversely on the credibility of an attorney's opinion, there is insufficient time to effectively communicate the impact of such research to the client.

3. Evaluate the case

An accurate evaluation of the case by experienced trial counsel is essential to prepare for a successful mediation. This evaluation should contain an objective summary of operative facts and an evaluation of applicable law along with the probability of prevailing at trial, the verdict range if the case is tried and lost and the cost of trying the case to verdict and final judgment. All costs and expenses should be considered including trial testimony and videotaped depositions of treating physicians and liability experts. Witness fees, travel and lodging, exhibits and transcript costs should also be considered. To properly evaluate their case, personal injury plaintiffs may need information and education on the time value of money and the tax consequences of a structured settlement. All of this information must be effectively communicated to the client with sufficient time to consider options, obtain authority and devel-

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op a plan of action before the mediation.

4. Select the right mediator

Not all mediators are alike. They come in a broad range and variety of skills, experience and abilities. Choosing the right mediator for your case can make the difference between promptly and favorably settling the dispute and simply raising the stakes.

An effective mediator should appear neutral and have the stature and reputation to command the respect and confidence of all parties. The mediator should demonstrate strong leadership skills and maintain firm control over the proceeding. This aspect of mediation is an art and not a science. It requires the ability to facilitate the sensitive balance between an appropriate emotional release which may be necessary to allow parties to feel they are having their "day in court" and the succinct professional presentation which is necessary to bring reason to the proceeding.

Every case is different, and the importance of matching the mediator to the case cannot be overlooked. There is a large reservoir of information developing on most active mediators, and today's litigators should obtain and evaluate this information before selecting the mediator for their case.

5. Persuade the mediator

Most mediators will accept and read a mediation submission of 10 pages or less when it is received at least 24 hours before the mediation conference. While the oral presentation at the mediation clearly outweighs the effect of these submissions, the value of the written submission should not be underestimated. It represents the first opportunity to explain the merits of the case to the mediator, and it provides a framework for organization of the case which can be used not only at the mediation conference but later in trial briefs and arguments to the jury.

Although mediators are neutrals and should never act as an advocate for either side, they are clearly better equipped to articulate your client's position in private sessions with your adversary when they are truly convinced of the merits. Although candor is necessary to maintain credibility, every effort should be made to present persuasive arguments to the mediator to support your evaluation of the case and settlement posture.

6. Involve the decisionmaker

ADR Rule 2.7(B)(2) provides that:

All parties, attorneys with settlement authority, representatives with settle-

ment authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court.

It is important to follow the spirit of this rule by ensuring that the ultimate decisionmaker (whether it is plaintiff or plaintiff's spouse, parents or guardian, or the named defendant's CEO or board chairman, the insurance company adjuster, supervisor or vice president) has a presence at and involvement in the mediation. This does not require that the ultimate decisionmaker be physically present. Indeed, compelling an unwilling decisionmaker to travel and participate in person may have adverse effects on the outcome of the mediation.

What is necessary is that the ultimate decisionmaker, one who is fully authorized and prepared to act, know the case and have ample opportunity to digest the evaluation of trial counsel and be available and involved in the process. This can be accomplished by telephone and facsimile transmission very effectively, but only if there is proper advance preparation which leads to a clear understanding of the case and genuine willingness to participate in good faith in the mediation process.

7. Create the right atmosphere

Mediation and settlement negotiations are delicate matters. Extreme subtleties can affect the outcome. Unlike discovery proceedings where hospitality may be counterproductive, experience has shown that comfortable surroundings and a congenial atmosphere can create goodwill and facilitate compromise and settlement in mediation.

Successful mediation requires at least two conference rooms with private telephone lines, sufficient seating and appropriate beverages. All participants must dedicate adequate time to the process to review the evidence, address the material issues and allow the negotiations to flow naturally. Although food will probably become necessary before settlement is reached, breaking for lunch can derail the process by relieving the sense of urgency and solidifying adverse positions. For this reason, the mediator should be prepared to work through the noon hour and have lunch delivered to the mediation conference.

8. Be prepared to leave

In any negotiation, there is a time for aggressive advocacy and posturing as well as a time for honesty, conciliation and teamwork. While creativity and persistence are valued in mediation, if all efforts to reach common ground fail, there is a time to terminate the mediation. ADR Rule 2.1 states that parties and their representatives are

required to mediate in good faith but are not compelled to reach an agreement. ADR Rule 2.7(D) states that:

The mediator shall terminate the mediation whenever the ability or willingness of any party to participate meaningfully in the mediation is so lacking that a reasonable agreement is unlikely.

Preparation to terminate the mediation should be made in advance based on a well-reasoned and objective evaluation of the case. The decision to terminate should never be based on an emotional reaction during the heat of the battle. If specific plans for termination (including the "bottom line" or "top dollar") are not made before the session begins, the dynamics of the process can skew objectivity and result in the client paying too much or accepting too little in settlement. No one should ever be criticized for terminating a mediation according to plan when settlement authority based on a well considered evaluation prior to mediation is exhausted.

Conclusion

There is little doubt that mediation can be an effective dispute resolution mechanism. It is not, however, a substitute for case development and evaluation. Rather, mediation should be viewed as a supplement to the litigation arsenal and a motivation and deadline for completion of necessary trial preparation. In addition, care must be taken to set the stage for a successful mediation. The appropriate mediator should be selected and adequate facilities secured for the conference. Every attempt should be made to persuade the mediator that your settlement position is correct. Your client, the ultimate decisionmaker, must be well informed, fully authorized and prepared to participate in the process whether in person or by telephone. If this advance work and planning combined with persistence and creativity at the mediation does not result in settlement, be prepared to terminate mediation and proceed to trial. Remember, more trials are avoided by preparing for them than by preparing to avoid them. •

Bryce H. Bennett Jr. is a founding partner of the Indianapolis law firm Riley Bennett & Egloff. He is an experienced trial lawyer practicing almost exclusively in the area of civil litigation. He is a certified Alternative Dispute Resolution mediator and has experience as an arbitrator and judge pro tempore in the Marion Superior Courts. He is past chairman of the Executive Council of the Indianapolis Bar Association Litigation Section and currently serves on the IBA Board of Managers.