Mediation Strategies

Lawyer Preparation for Mediation puts Money In Clients' Pockets

By Lee Jay Berman

While all good attorneys prepare intensely for arbitration or trial, it is a wonder that more fail to prepare better for mediation. As the legal community continues to use mediation as an effective case settlement tool, it is becoming clear that attorney preparation plays a vital role in achieving a favorable result. Whether dealing with hundreds of thousands or millions of dollars, shooting from the hip is too risky.

Various studies show that 95-97% of all cases settle before trial. In this legal climate, logic would dictate that attorneys should be investing significant time and resources in preparing for mediations. While money spent on a successful mediation can be relatively minuscule compared to the costs of trial, an unsuccessful or frustrating mediation can be a costly investment.

There are many facets to preparing effectively for mediation. Here are a few key ideas to think about in an effort to maximize your next settlement at mediation:

■ **Prepare for your mediator.** Information is power. Learn what you can about your mediator by devouring the mediator's web site. Learning about his or her substantive background will help attorneys know whether it will be more effective to explain the case's subject matter in lay terms or in industry-specific terms of art.

Find out if the mediator prefers a brief, an informal letter, a copy of the pleadings, or no advance information at all.

Ask colleagues about the mediator's style. Find out if this mediator tends to ask the clients to give an opening statement or prefers to hear from counsel. Ask if this mediator be trusted with an honest bottom line and confidential information.

Find out if your mediator is an expert negotiation strategist, or if the participants will need to lead the dance. Learn if this mediator will simply pound on both sides in caucus, or whether he or she will expect to evaluate the case's specific merits and pitfalls. All of this information can help to make counsel more effective with a mediator.

With larger or more sensitive cases, mediators often welcome phone calls from counsel explaining a case's particular challenges or subtleties in advance of the mediation. Sometimes counsel resist the gut instinct to do this, worrying about *ex parte* communication, but in mediation, such communication is not only allowed, it is an

integral part of helping the mediator with key insights.

■ **Prepare yourself.** Clients know. They know their cases – intimately. They know when counsel is bluffing and doesn't really remember dates, names, amounts. They know when attorneys talk about them in the third person and hesitate before calling them, "My client" because they cannot remember their name in that moment.

Ultimately, counsel must know the details of the case as if it were their own dispute. Counsel should write, or at least review, the briefs, if only to reinforce the case details in their own mind.

It is often advisable for attorneys to prepare a chronological event timeline as a guide during their opening statement.

Knowing the case and presenting it well makes the attorney appear sincere, honest, and knowledgeable, impressing the mediator and opposing counsel, resulting in more money in the client's pocket at the end of the day, keeping clients loyal and generating referrals.

■ **Prepare the case.** Timing is everything. In setting up mediations, it is sometimes the hardest part. Knowing that good mediators are often booked weeks or months in advance, and trying to predict when sufficient discovery will be completed, allowing the mediation to be productive is often a difficult calculation. While information can always be exchanged during the mediation, it often leaves the recipient insufficient time to evaluate it and respond appropriately.

If the case is not ripe for settlement, do not have the mediation. Taking into consideration the mediator's fees, client and counsel preparation time, brief writing, and the cost of the day to the client, it is sometimes wiser to pay a cancellation fee and postpone a mediation that is premature.

Few things hurt the attorney-client relationship more than a long, frustrating day spent in an unproductive mediation, disappointed by expectations of closure. Communicating with the mediator and opposing counsel can help to insure that all are ready, have what they need, and are coming prepared to make tough decisions about how they are willing to resolve the matter.

On the other hand, attorneys with agile clients who are prepared to make immediate decisions can have a very productive mediation by sharing information introduced during the mediation, considering it, and making solid settlement decisions. Especially in business and transactional disputes, where there are no adjusters involved, mediations can still bring closure even when discovery responses are still outstanding.

■ **Prepare the client**. Increasingly, in most types of cases, clients are being asked to participate actively in the mediation. Seasoned counsel understand that in addition to presenting their case at a mediation, they are also presenting their client. Preparing the client in advance with an understanding of what to expect and what will be expected of

them will allow them to make a much better showing. Clients who present better have the negotiating edge at the end of the day.

Counsel should review with the client what to cover or emphasize during an opening statement. It is inevitable that clients be evaluated as a potential witness, both by the mediator and opposing parties. This becomes more critical if the client has not yet been deposed. Attorneys who deal with mediation regularly can underestimate the discomfort these legal and quasi-legal proceedings can cause their clients. Prepare them in advance and they will be grateful.

Clients are too often mislead by having counsel ask them to develop a bottom line in advance of the mediation, rather than being properly prepared to evaluate new information and make decisions based upon the happenings of the mediation.

Clients also need to be prepared for the difficult nature of the mediation process. It is often hard on clients who begin the day with high expectations, and continue to be disappointed by the other side's subsequent offers, taking successive steps backward in compromise after compromise in route to a disappointing or "equally painful" final compromise. Clients who are prepared for the negotiation dance will be much more pleased with their representation when all is resolved.

In closing, while we do not address mediators as "Your Honor", that does not mean that counsel should approach a mediation with less preparation or strategic planning than they would in anticipation of a trial. After all, for most cases, mediation is "their day in court".

Lee Jay Berman *is a full-time mediator and trainer based in southern California. Since 1994, he has successfully mediated over 1,000 cases. He is a Fellow with the International Academy of Mediators and a Diplomat with the California Academy of Distinguished Neutrals. He mediates for the AAA, the National Panel of Distinguished Neutrals for the CPR Institute and AMCC. He is Director of the "Mediating the Litigated Case" program for Pepperdine's Straus Institute for Dispute Resolution and Co-Chair of the ABA Section on Dispute Resolution's Practice Development Committee. He has trained judges, lawyers and business leaders from India to Croatia and across the U.S. in mediation and negotiation skills. He can be reached at 800-395-6495 or leejay@mediationtools.com.*