

Preparing Your Client for **M E D I A T I O N**

By Hon. Richard A. Siebel (Ret.)

A successful mediation depends upon several factors, including selecting the right neutral, designing the right process, thorough counsel preparation and effective tactics at the negotiation table. There is one factor, however, that can be critical to the outcome of the mediation and is often overlooked: client preparation.

Having the attorney and the client work as a team is essential to a successful mediation. Client participation in the planning process better prepares a client to become actively and constructively engaged in the negotiation process which in turn leads to a greater likelihood of a successful mediation.

Explain the Process

Explain the mediation process. Advise the client that initially all parties, counsel and the mediator will be present during the opening session. Discuss the confidential nature of the process and explain how the mediator will deal with confidential disclosures. Explore having the client participate in making an opening statement.

Prepare the client for possible venting by the other side so the client will be prepared to respond (if advisable) in a constructive manner and not be shocked by the outburst. If your client is still emotionally invested in the case, consider recommending that he or she unburden himself or herself during the opening statement. Sometimes a little catharsis can facilitate settlement.

Review the Benefits

Discuss why mediation is in the client's best interests. Inform the client of the benefits of mediation including confidentiality, early dispute resolution, preservation of valuable professional or personal relationships, party-controlled outcomes, and avoidance of the cost and

uncertainty of litigation. Explain the paradigm shift from litigation (rights based) to mediation (interests based). Litigation is a competitive win-lose situation where one party gets what it wants at the other party's expense. In contrast, mediation is a win-win situation allowing the negotiations to be based on the parties' respective goals and interests, potentially resulting in a mutually satisfactory outcome for all involved.

Discuss the Roles

The role of the mediator can be confusing to clients. Explain that the mediator will not be acting as a judge or as an attorney. The mediator works as an impartial third-party with no vested interest in the outcome of the mediation. The function of the mediator is to assist the parties in settling the dispute. Suggest that during the process the mediator may present information that contrasts with your client's view of case. Inform your client that the mediator is not agreeing or siding with either party. It is part of the mediator's role to raise such issues. Let the client know that the mediator may be conducting "reality checks" from time to time by giving evaluative opinions.

Advise the client that you, the attorney, will be presenting the case in the most favorable light, but will not be trying the case before the mediator. There is no judge; there is no jury. Explain that the role of the attorney in mediation is to counsel the client in an effort to resolve the dispute on favorable terms.

The mediation process empowers the client to make the decisions. Neither a judge nor a jury will be making any decisions. Ensure that your client understands that he or she and the opposing party are the most important people in the room.



Establish Reasonable Expectations

Attorneys are often prepared for frustrations. Clients, on the other hand, may have high expectations as to how the mediation will unfold and what will be the result. Clients may be surprised to discover that settlement offers can start low or demands high, and that there may be extended periods of time when the mediator is in caucus with the opposing party. Let your client know this is common.

Establish reasonable expectations with your client from the outset. Clients can be emotionally tied to their dispute, preventing them from identifying the strengths and weaknesses of their case. They may not be aware of, or simply refuse to acknowledge problems with their claims, and their expectations may bear little relation to reality. Give your client a view of how the other side might see the case. Make sure your client is aware of potential problems. Expectations should be lowered to align with the realities of settlement.

Discuss the Importance of Flexibility

Clients have a tendency to think that a willingness to mediate signifies weakness in their position. Focus discussions on the opportunity a mediation affords to shape a solution as opposed to having one imposed upon your client. Speak in terms of what the client “needs” to settle the case as distinguished from what the client “wants”.

Speak with your client about possible non-monetary components of a settlement. Do not limit the discussion to the types of damages asserted in litigation. Brainstorm options that might appeal to the other side but are not costly to your client, such as ongoing service/business agreements, other business transactions or opportunities, referrals, continuation of benefits, early retirement options, training programs and apologies. Mediation

allows for a wide range of settlement opportunities often overlooked by clients and attorneys.

It is important to be flexible during mediation proceedings. Beware of locking into a bottom line that is unrealistic. Never make a “final offer” or “final demand”.

Pre-mediation Submissions

Discuss preparation of your pre-mediation submission with the client. Have the client review your pre-mediation submission before it is submitted to the mediator and opposing counsel. Share and discuss opposing counsel’s pre-mediation submission with your client well before the mediation day.

Conclusion

Thorough preparation of your client can greatly enhance the pace with which the mediation proceeds and the final outcome of the mediation. It is an attorney’s responsibility to educate his or her client with respect to the technical aspects of the process as well as the emotional factors that play a significant role in the process. The better a client is prepared, the greater the likelihood the mediation will be resolved to the client’s satisfaction.

About the Author

Hon. Richard A. Siebel is Of Counsel at K&L Gates LLP where he concentrates his practice on commercial litigation, mediation and arbitration. He also serves as a Senior Mediator/Arbitrator at ADR Systems of America. Judge Siebel has achieved a notably high settlement rate in mediation and has successfully adjudicated many complex matters in arbitration. He may be contacted at K&L Gates at 312.781.6025 or richard.siebel@klgates.com. At ADR Systems he can be reached at 312.239.1552 or info@adrsystems.com .