TOP 10 TIPS TO GET THE BEST MEDIATION RESULTS

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Mediation: Why Does It Matter?

Abraham Lincoln said that "[a] good settlement is better than a good lawsuit."

Most civil lawsuits settle.

Fewer and fewer civil trials occur.

Trial results are unpredictable.

As a result, mediation has become a increasingly prevalent way to resolve cases. And, most civil lawyers go to mediation far more often than they go to trial.

As such, lawyers should be as trained and talented at mediating as they should be at trying a lawsuit.

Our goal today is to give you ten tips and tactics to help make that happen, so you can get the best possible results in mediation.

1. Pick The Right Time To Mediate

- For the plaintiff, in most cases, any early mediation is a good move. Even if the case does not settle, the plaintiff can send important messages to the defendant about their case and settlement expectations.

- For the defendant, sometimes, an early mediation makes sense. For example, if the defendant has really bad evidence that would come out in discovery. Or, if it does not want to spend the money necessary to fully litigate the case.

- Try to go into mediation with momentum on your side, or in a strong position, rather than at a point when you are in a weakened position.

  - For example, a good time for the plaintiff to be going to a mediation is right after a court denies the defendant's MSJ in a case where it is plain that the defendant does not want to go to trial.
  - On the other hand, a good time for the defendant to be going to a mediation is right after it has filed a strong MSJ in a court that has granted SJ in many similar cases.

1. Pick The Right Time To Mediate

If you cannot make that happen, at least go to mediation in a somewhat "neutral" position, such as:

- After each side has exchanged written discovery, but before depositions.

- After each side has a fully briefed MSJ and response on file.

Try not to ever give a number before a mediation that does not give you a lot of room to work with in mediation.

2. Pick The Right Mediator

You want a mediator who:

- Will be aggressively optimistic with both sides about the case settling from the start to the end. This can make a big difference.
- Commands respect from both sides.
- Will take control, by, for example: (a) telling the parties that only they may declare an impasse and unless and until they do, no one may leave; and (b) being professional yet blunt about the real potential downside consequences of not settling the case.
- Can credibly connect and win the trust of the most critical persons to the mediation, whether that be a CEO, or an angry ex-employee who believes they were wrongly terminated by your client.

2. Pick The Right Mediator

You want a mediator who:

- Tells you what they are going to do when they talk to the other side, and gets your approval to do it in advance.
- Will relentlessly push on both sides to get the case within a range of realistic potential settlement.
- Who will, after a few hours, without telling either side, formulate and implement a specific strategy to settle the case (e.g., exchange of specific numbers followed by a mediator's proposal).
- Knows how to close the deal, and then button it up, both from a legal perspective (mediation agreement) and an emotional one.

2. Pick The Right Mediator

- If you are not familiar with them, ask the proposed mediator what their style is.
- If you are not familiar with them, ask the proposed mediator what their feelings are about brackets, mediator's proposals, how to send a message that you are willing to get real without showing weakness, etc.
- If you are not familiar with them, get input from other lawyers who have used them in the past.

3. Prepare Your Client Before The Mediation

Meet with your client and:

- Explain the mediation process, the mediator's role, their role, your role, and common things that happen in mediation.
- Discuss what a reasonable range of settlement would be in their case, based on the facts, the law, the likelihood of success at trial and on appeal, and other relevant factors (such as time).
- Emphasize that range could change based on new information you learn, and it is common to learn such information in a mediation, especially an early one.
- Come up with a tentative game plan for the day, including: (a) what the opening number will be; (b) identifying some information or compelling points to dole out to the mediator to use with the other side as the day goes on; and (c) thinking about an end game strategy.

3. Prepare Your Client Before The Mediation

Meet with your client and:

- Lay the groundwork for emotionally preparing your client to settle the case once and for all and move forward.
- Remind them that while the goal is always to obtain the best settlement possible, if you settle for any amount in the range of reasonableness (see prior slide) that is a great result as compared to years of litigation to an uncertain end to be decided by people you don't know and who are likely to see things much differently than you see them.
- If the client is a married person, discuss whether their spouse will attend and, if so, prepare the spouse.
- If your client is a company, decide who will attend the mediation as the company's representative. Pick the person most likely to be able to make the mediation successful. Often, that is not the person from the company who has the most personal involvement in the situation.
- If other persons within the company are important to the case, but will not attend the mediation, make sure they are on stand-by for questions on the day of the mediation.
- Get authority.

3. Prepare Your Client Before The Mediation

Meet with your client and:

- If you are the plaintiff's counsel, explain to your client what the key terms of a settlement likely will be if there is a settlement, so they are not surprised.
- If you are the defendant's counsel, consider preparing the settlement agreement fully in advance, getting client pre-approval of it, and having it ready to finalize and have executed at the mediation. In some (but not all) cases defendant's counsel may even want sharing the form with plaintiff's counsel in advance.
- Think about and brainstorm with your client about:
  - How badly (or not) they have to, or want to, settle at mediation, or very soon thereafter.
  - How badly (or not) the other side has to, or wants to, settle at mediation, or very soon thereafter.
  - Why are you going to mediation, and why does the other side think you are going to mediation?
  - Why is the other side going to mediation?
  - The answers to these questions will impact how you negotiate at the mediation.
  - Even if you really have to or want to settle at mediation, never tip the mediator or other side off to that.

4. Prepare The Mediator And The Other Side Before The Mediation

Send the mediator a persuasive mediation statement well in advance of the mediation, and strongly consider sending it to the other side. It should:

- Set out the key facts.
- Provide a legal analysis of liability and damages, supported by statutes and case law.
- Consider sharing problems or challenges you see to settlement, either in the memo, or in a pre-mediation call to the mediator.
- Express confidence in the case at trial and if there is an appeal.
- Express a willingness to litigate the case as long as necessary if a reasonable resolution cannot be mutually agreed to.
- End with a commitment to being willing to negotiate in good faith in an effort to reach a reasonable resolution.

5. Be Polished And Professional In The Joint Session

In the joint session:

- Listen carefully, and change your expectations if what you hear logically compels you to do so. Denying reality gets you no where.
- Shake the other side's hands.
- Smile warmly and be friendly.
- Compliment their choice of counsel.
- When the mediator or other side is talking, look at them, be respectful, and do not be on your phone.
- When the other side's lawyer is talking, look at them and listen to what they say, without interrupting them.

* On very rare occasions, in very specific circumstances, some lawyers believe that a planned interruption may be necessary to really make an impact on a corporate defendant and to maximize results.

6. Deliver An A+ Level Opening Statement

- Remember, you are being judged by the other side as an advocate, and how good they think you are in that role will probably make a difference in their valuation of the case. Therefore:
  - Try to give your opening without notes, or with as few notes as possible.
  - Be persuasive, appropriately passionate, show flair, and be entertaining.
  - Show confidence in your side of the case.
  - Address the key issues that the other side thinks favors them – a specific case or defense, the venue, etc.
  - Demonstrate a total command of the facts and law.
  - Show pride and confidence in your client.
  - Emphasize that you are not there to inflame or upset them, but instead to truthfully and transparently share with them some of the reasons why you are so confident in your side of the case and why you value the case as you do.

6. Deliver An A+ Level Opening Statement

- Talk in terms of what a jury is likely to conclude based on the evidence, rather than what really happened. Framing it that way is more likely to get through to the other side in a productive way.
- Consider saying something to cause the other side concern about what may come out in the future if the case does not settle – e.g., we know "X," and "the investigation continues."
- Tailor it to your audience for maximum impact and credibility. For example, even if the facts were substantially the same, the type of opening statement you would give to a large and sophisticated publicly traded defendant/employer that is being represented at a mediation by its General Counsel would be different in tone and substance than one you would give to a small or mid-sized defendant/employer being represented by at a mediation by its sole owner.

6. Deliver An A+ Level Opening Statement

- Before one can understand, they must feel like they have been understood.
- So, in the opening statement, take time to make the other side know that you understand their legal positions and how they feel. Then, explain why those positions or feelings will not carry the day.
- It is especially important to let individual plaintiffs in emotional cases know that you understand how they feel, before refuting their case or explaining your position.
- End the opening like you ended your mediation statement (*see* Tip No. 2).
- Hold some specific points back to dole out as the day progresses and numbers are exchanged. Keep a list of those points to use throughout the day.

7. What About Not Having A Traditional Opening Session?

- This seems to be becoming more prevalent.
- In some cases, where the parties have gone through full discovery and/or a prior mediation, maybe that makes sense.
- But, most often, an opening is an important part of a mediation, and not doing one is a missed opportunity.
- Sometimes, a refusal to do an opening is itself a mediation strategy – a way of saying "we don't want to hear your BS." But, it could also be a way of saying, "we are here to settle today based on our analysis and authority, so let's dispense with the opening and get down to negotiating."

7. What About Not Having A Traditional Opening Session?

If the other side refuses to do an opening session, then propose at least having an initial meeting where:

- Each side shakes hands and introduces themselves; and
- The mediator summarizes each sides' main contentions and the main issues in the case, then encourages everyone to get to work in a positive way.

8. Support Your Opening Demand Or Offer

- If you are the plaintiff, explain how, under the law, and the available damages, you got to your number. If you can offer examples from real life where that happened, and/or a court affirmed it, that is even better.

- If you are the defendant, do the same.

- It is often worthwhile to refer to this as the mediation goes on, to demonstrate your actual or alleged reasonableness in moving off that number.

9. Negotiation Strategies

- Use the mediator to raise issues with the other side that you cannot or should not raise in yourself, but which could have an impact on them. For example: adverse publicity of a suit is filed; ramifications on customer relationships if a suit is filed that involves customers, etc.
- Ways to show you are getting real without signaling weakness:
  - Blame the mediator (with the mediator's approval). *I*.e., the mediator twisted our arm, and promised he or she would twist yours too.
  - Olive branch analogy – but expect reciprocation.
  - Bracket proposals.
  - Moving to a number that is "X" percentage of some defined number that could reasonably be in play if the case is resolved through a trial and/or appeal.
  - Offering costs of defense.

9. Negotiation Strategies

Ways to close the deal:

Talk to the mediator about strategies for it well in advance. What may be effective for one type of case, may be totally ineffective and counter-productive in another type of case.

Involve the mediator in the strategy. Some common ways to close the deal include:

- "Dump the money," and impart a sense of urgency.
- Playing for a mediator's proposal (need to discuss with mediator well in advance, and be sure it is documented so there is no dispute later on about what the proposal was). Also, be careful about responding to a mediator's proposal.
- Split the difference.
- Last, best, and final.
- Pay for the mediation fee, and call it a day.
- The "clients only" face-to-face.

10. Take Your Time With The Settlement Agreement(s)

- This aspect of the mediation is akin to landing a plane: it is where the potential for an "accident" is highest.
- Best if final agreement is fully negotiated and executed at mediation. As noted, defense counsel should bring a draft with them.
- But, often, instead, there is a "mediation agreement" with a final, more comprehensive and detailed agreement anticipated. If so, be sure it covers the most significant provisions, including, for example: (a) when the "final" agreement is due to plaintiff's counsel; (b) how the settlement will be categorized for tax purposes (W2, 1099); and (c) mutual releases or not.
- Be sure your client fully understands each provision of the settlement agreement, and will comply with them all, including confidentiality, non-disparagement, and "no reapplication" or "no rehire" clauses.

THE END

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