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ADR: Making the Most with What You Have

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"If I had more time, I would have written a shorter letter."
—Marcus T. Cicero

"If you haven't got the time to do it right, when will you find the time to do it over?"
—Jeffery J. Mayer

Cicero's poignant words from the 1st century B.C. still have application today. And so does the retort by Mr. Mayer, author of *Time Management for Dummies*. Being brief requires a lot of work!

Preparing for trial or a motion hearing takes a great deal of preparation, but preparation for mediation takes time and effort in ways quite different from preparation for litigation. You are no longer trying to convince the tribunal of the wisdom of your client's claim. Rather, your objective is now to accomplish the best, most predictable and workable solution for your client's legal dilemma.

Unfortunately, some litigants approach mediation as if it is a side trip on the journey to trial, but many jurisdictions now mandate some attempt at ADR. And, from experience, you know that you will stand in good stead with your trial judge if you answer in the affirmative when you are asked if you have attempted settlement.

While mediation can be expensive, it is well worth the cost and effort if you properly prepare for and use it to your advantage. Your client deserves the best outcome he or she can obtain and that is not always what is received in a verdict after an expensive trial. With that in mind, here are some recommendations for engaging in settlement negotiations.

Preparing for Mediation

First, conduct adequate discovery so that you will avoid unknowns that impede the progress of mediation. Parties can shy from settlement because they lack critical information that will help them accomplish a deal.

Next, determine what is important to your client. You will avoid unnecessary conflict and wasted time by isolating minor issues in advance. This enables you to focus on the real issues while providing you with potential giveaways your client can afford to relinquish.

Realistically assess what your client can achieve in settlement. Mediation is not the trial, but it promises to end the litigation. Therefore, holding out for theoretical trial objectives can be an unproductive waste of precious time. Assist your client in determining the bottom line before going into mediation. Then prepare your client to be patient and flexible as that bottom line is threatened or even breached during negotiations.

Attempt to figure out what your opponent truly seeks. Using a mediation session to learn what is important to the opposition can be a frustrating waste of time. Often things are not as they appear. But you will be one giant step ahead of your opponent if you can address issues dear to his heart while accomplishing your client's goals.

Have a plan for accomplishing the settlement. It makes no sense to arrive at a settlement number if you don't have a means to pay it off or make it happen. And trying to be creative in implementing the settlement can prolong the negotiations.

Going into Mediation

Select a mediator who has the expertise and demeanor to accomplish settlement. In "What a Difference a Robe Makes,"[1] the researchers found that "a — if not *the* — core element in achieving dispute resolution success was the mediator's ability to establish a relationship of trust and confidence with the disputing parties."

Those skills include the ability to be tactful and diplomatic, show a friendly and empathetic attitude, have an understanding of people and demonstrate high integrity.

> Accordingly, we suggest that rather than to categorically select — or exclude — either judges or non-judges from a list of potential mediators, counsel should first look for mediators who possess one or more of the important confidence building attributes. Beyond that, counsel should consider the extent to which process skills and/or evaluative skills are important in overcoming the barriers to settlement in the particular case that he or she is handling.

You can imagine how the selection of the proper mediator can shorten the time in negotiations and facilitate a complete settlement — a significant cost savings to your client.

Write a focused, simple mediation statement. Here is where brevity is essential. Avoid dwelling on trial theories and objectives more appropriate for trial or a motion. Most of all, focus on evidence that will make a difference to the process and identify the issues that must be addressed by the mediator in order to bring the parties together in settlement.

Deliver your brief to the neutral well ahead of time so it can be fully studied. Again, remember that your objective is to ready the neutral as much as you can to advocate your position with the opposition.

Share everything you can with your opponent. It makes little sense to hide your strengths, especially where you are protected by court rules. This is a corollary to the first rule above urging you to conduct adequate discovery. If you must hold back some information, clearly explain to the neutral what is confidential and why it was withheld.

Include only the most important evidence and exhibits, the ones that control the outcome. Again, this is not motions practice, so a complete set of exhibits may overwhelm the process and derail the mediator. Time will be saved if you are circumspect in what information you provide to the mediator.

Conduct During Mediation

Itemize all of your issues at the outset and track them as the negotiation proceeds. Nothing is more irritating than having to deal with last-minute issues that had not been placed on the table in the course of negotiations. And omitting a material term from a settlement can be very expensive to repair.

Be truthful and exact in your presentation. Puffing, while expected in negotiation, should not be used to the point that it prolongs or derails settlement. By contrast, bluffing that lacks a factual basis or outright misrepresentation of facts has no place in mediation.

Be creative in your solutions; think of settlement terms that would not be available to a judge at trial. This is the beauty of mediation. While a judge is constrained by applicable law, your client is not (at least within reason).

With the mediator in separate caucus, be honest about case weaknesses. This is an excellent opportunity to critically examine your trial theories and evidence, and observe your client as a witness. Feedback from the neutral will be very helpful.

Have a draft CR2A agreement ready to go at mediation, but leave out boilerplate. Last-minute mediation agreements scribbled on a legal pad often require substantial work to reduce to a final settlement. Mediations are unnecessarily complicated because the "devil's details" were not revealed at the moment folks thought settlement had been achieved. You and your client will be very happy leaving the mediation session with a final, comprehensive agreement signed by all parties.

Realistically estimate the time remaining to be expended in trial preparation; this will be the future "transactional costs" you will avoid by reaching settlement. You can throw that in as a bargaining chip, thus arriving at a final settlement.

Know and document your fees if that is part of the settlement and deliver that information ahead of time. Many mediation sessions are not completely settled because the parties failed to present their fee and cost statements until the end, if at all. That surprise can make settlement very difficult, especially after a long, rigorous and often emotional negotiation.

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There is no substitute for the hard work it takes to prepare for and successfully accomplish settlement. Make it a central part of your litigation plan and put in the time and extra thought to make ADR a success for your client.

Your goal is to conclude the controversy for your client. Therefore, settlement negotiations must be a central part of your trial strategy. Plan for it and make it happen for your client's best interests. ■

[1] Goldberg, Shaw and Brett, Negotiation Journal, July 2009.

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