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Mediation is about cutting a business deal

By Zela "Zee" Claiborne

Mediation is popular with business people and their counsel because it is a low risk process with a remarkably high success rate. The process is far less expensive than trial and avoids costly discovery since it usually includes an informal and voluntary exchange of key documents and other information. Even more important, mediation offers a chance to preserve business relationships. Participants like the fact that the process is confidential so that their business problems and intellectual property are shielded and allows parties to maintain control of the outcome. Parties work with the mediator to craft a business deal to resolve the dispute rather than perhaps having to live with an adverse judgment imposed by a judge or arbitrator.

The key to mediation success is thorough preparation including the following:

1. At least a week in advance, submit a brief that outlines the facts of the case and the evidence and law on which you rely. Focus on the key issues in the case and include detailed damages information. Attach significant documents supporting your client's position. While lengthy legal arguments may be important at trial, they are not usually the basis for a mediated settlement. Therefore, it is not necessary to attach your complaint or motion for summary judgment. Instead, include some thoughts about a possible settlement. Mediation is about cutting a business deal.

2. Exchange briefs with the other parties. While some lawyers may resist exchanging briefs, mediation is more successful when

participants are aware of the arguments of the other side and have a chance to consider a response. There may be important facts revealed that will help the parties evaluate the case. Include information in the briefs that might assist the decision-maker on the opposing side to understand your client's point of view and, perhaps, reevaluate their settlement position. Exchanging briefs helps the parties come prepared to move promptly into meaningful negotiations instead of spending the morning discussing background information.

3. Sometimes there may be sensitive confidential information that you do not want to share with the opposition but do want the mediator to know. For instance, you might outline your client's business goals, your perceptions of problem personalities or other obstacles to settlement, or preliminary thoughts about a creative business resolution that you are not yet ready to share with the opposition. Be candid with the mediator. Send that information in a side letter for the mediator's eyes only or request a call to discuss your concerns in private. There is no bar to ex parte communication with a mediator and the information provided will assist the mediator in evaluating the case for settlement.

4. Participate in a pre-mediation call with all counsel and the mediator. You may want to ask the mediator's help in agreeing to an informal exchange of information in advance of meeting. Also, you may discuss the structure of the mediation process most appropriate to your specific case and make precise plans as well as agreeing to some ground rules. An experi-

enced mediator will use the flexibility of the mediation process to help design a procedure tailored to your specific case. If you have important information to share with the other side, such as technical specifications or accounting information, you may want to request a joint session at the outset of the mediation and plan a presentation. If there already has been an adequate exchange of information, you may want to skip that step and move right into negotiations.

5. Prepare your client for mediation by discussing a range of settlement options. Consider how the case might look to the opposing side and what their settlement needs might be. There may be new information presented that will cause your client to re-evaluate his or her settlement position. Or you may want to consider options that include offering something other than money such as an agreement to do business in the future or accept services in trade. Stay flexible and willing to take a fresh look at the case. Be sure your client is prepared to participate in discussions with the mediator. And keep in mind the difference between highly adversarial litigation advocacy and deal-oriented mediation negotiation. Be prepared to argue your case, but also show respect for the opposition and work toward a deal that makes business sense.

6. The attendance of decision-makers is important to successful resolution. Counsel should give serious thought to which individuals are needed to close the deal and be sure that key people are present. Mediation is a fluid process and a lot of information will come out as it proceeds. A decision-maker who is only available by phone will not be privy to the

subtleties of important discussions and may miss important openings for settlement. Worse, it is easy for a non-participant to stay uninvolved and say "no" even to reasonable proposals. Make sure that decision-makers are active participants and select those who can speak in terms of issues and litigation risks, while keeping emotions under control in order to increase chances for successful resolution.

Mediation offers a chance to maintain some control of the resolution of a dispute and avoid the high costs and risks of litigation. Often, a mediated resolution is a business deal that, in the eyes of the participants, is far superior to any legal remedy that might have been available at trial or arbitration. Make the most of the mediation opportunity!

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