



MAKE THE MOST OF YOUR MEDIATION: EARLY PREPARATION

By Hon. Lynn Duryee (Ret.)

Your mediation is months away. Is there anything you can do today to create success on your big day? Here are three sure-fire winners.

1. Develop an elevator pitch. In 30 seconds, summarize the essential and persuasive details of your case. What will grab the listener's attention, deliver the basics of the claim and make the listener care about your client?

Most lawyers are inclined to start at an imagined beginning—not infrequently their client's birth—and then work their way—fact by fact, year by year—to the main event. This approach, while logical, often leaves listeners unsettled and lost.

Although a narrative along those lines might make for some suspense, in lawsuits, you don't want suspense; you want comprehension. Your listener—whether judge, jury or mediator—wants to know right away what kind of case you have. Is this a tort, a contract or what? Give your listener the big picture. This will help him or her organize and understand the information that follows.

Help others grasp the key aspects of the case right away: the identity of the parties, the type of case, the range of outcomes and the status of the litigation.

If you develop an elevator pitch as soon as your client signs the fee agreement, you will be able to use it as an introduction to all your future correspondence, motions, briefs and arguments. It will evolve over time as facts are added and you find better ways of synthesizing your case. It will be your mantra in your mediation, and in the unlikely event your case doesn't settle, it will form the basis of your opening statement.

Draft your elevator pitch today. Imagine that your lawsuit is a novel and you have to write the jacket copy that will make it a runaway bestseller. How will you pitch it?

2. Cultivate a relationship with your opposing counsel. It is tempting to think that lawsuits are resolved on the basis of the facts and the law. However, a huge factor in the way

a case is litigated and resolved is who the players are and how they relate to one another. An ancient myth in the legal profession is that the fearsome, snarling bulldog is the more effective advocate, for he will make life miserable for his opponent and ensure that his client recovers (or retains) every last dime. And while it is indisputable that such an advocate may make life awful for his opponent, it is not true that his client necessarily obtains the best result. Why? Because it always comes down to people. Would you voluntarily give your last dollar to the mad dog who has made your life wretched? No, you wouldn't, and neither would experienced adjusters. As they say about life (and litigation), "He who lives by the sword dies by the sword."

By contrast, lawyers who maintain professional relationships can accomplish the work of their clients with relative ease and efficiency. When it comes time for mediation, they are willing to hear what their opponent has to say because they respect the lawyer on the other side. Does this favorable attitude make a difference when the parties are perilously close to settlement and nobody wants to budge on the last \$5,000? All the difference. These are lawyers who have developed respect and cooperation. They're going to find a way to make it work. When they encounter the inevitable roadblock, they continue talking—long after the bulldog has stormed from the room and slammed the door behind him.

3. Prepare your client for settlement. Countless novels and movies have been made about jury trials, so litigants have a clear—if not totally accurate—picture of what their trial will look like. The client imagines that he or she will have a chance to tell his or her story clearly and lucidly while jurors and judge nod sympathetically; justice prevails; the evil person on the other side is excoriated; the music plays while the credits roll. By contrast, few novels and movies glamorize mediation. Many litigants do not realize that their case is likely to resolve short of trial, that they will have a chance to participate in the outcome of their case, that they'll be spending a day in a conference room discussing the pluses and minuses of their case and that their trial is unlikely to play out the way they had imagined.

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Educate your client at the outset of the lawsuit about the litigation process, including the timing and significance of the mediation. Preview the client early on about the process and the roles that each of you will play. As the lawsuit takes shape and the mediation nears, explain to the client what is likely to happen. Discuss the range of acceptable options for settlement and the risks and expenses of failing to settle. Neutrals are skilled at delivering bad news, but your client should not be hearing it then for the first time. A well-informed client is one who can make the best decision for him- or herself.

By following these three sure-fire winners, you will be in good shape to settle your case when the big day finally comes around. ■

Next up: How to Write a Winning Brief

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