

THE RECORDER

Learn to Shine Through Mediation



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With court closures, funding crises and long delays for justice, the full picture of the developing state of our court system still remains to be seen. As the legal industry navigates this new reality, those developing their legal careers as up-and-coming litigators face a whole new set of challenges. How can these litigators find opportunities to shine in the courtroom with delays and backlogs? Following are some recommendations on how the mediation process can help those attorneys raise their profile.

An effective mediation requires trust and communication between the mediator, attorney and client. Mediation is often seen as a way to manage and curtail the ongoing cost of litigation and provide closure to the litigants. The role of the lawyer is a critical component to this process and positive results can make lasting impressions on clients and a law firm — building lasting professional relationships and creating future business opportunities. A well-thought-out

strategy is essential to ensuring a successful resolution to any commercial disagreement through any ADR process.

ADR processes can create opportunities for advancement of younger lawyers like trial practice in the past.

Some ideas: Help your clients by introducing ADR and explaining the advantages of the mediation process from the beginning. It's important to manage and clear the litigants' mindset of any unrealistic expectations. Occasionally lawyers and clients place too much focus on the fight rather than resolution, which can hinder the best end result for the client. Certain factors may influence this mindset, like the stage of litigation, economic disparities or emotional ties to issues in dispute.

Use this opportunity to become a trusted adviser to your client. Counsel the client about the consequences of the unpredictability of trial, related costs and emotional drain. Sometimes clients might lose faith in the process or worse yet, lose faith in their attorney. It's important to demonstrate your commitment and continue communicating with your client throughout the process. Depending on your level of experience, volunteer to prep the client on the

mediation process or ask to shadow the client prep meeting. The more clients understand about mediation, the better they'll feel and the better you'll look.

Further, a skilled lawyer approaches mediation with a different set of tools than going to trial. Start shaping the process to reach your desired outcome well before the mediation takes place. Make recommendations based on your knowledge of the matter, style of the clients, opposing clients and their lawyers, desired end goal.

Initiate discussion about neutral selection early to signal your understanding of considerations most important for the matter at hand. Gather information about potential mediators by pulling articles, biographical information, recommendations from fellow attorneys or the mediator's case manager and seek references from both sides of the bar. Some important criteria to consider include reputation, subject matter expertise and whether they're evaluative or facilitative in style. Other questions to consider: Is the style of the mediator aligned with the personalities or the sophistication of the parties? Does the mediator have the appropriate business acumen if necessary? If there are outstanding questions,

suggest an interview with a potential mediator before selection to ensure the mediator's style or expertise is aligned with the needs of the dispute. The mediator interview is becoming more popular and generally there is no additional cost to the parties.

Volunteer to write the mediation brief, using it as a vehicle to demonstrate your grasp of pivotal issues and facts in the case. Exchanging a brief allows the mediator and opposing counsel to understand your clients' position, concepts and sought results. Without your brief there is a chance that you may need to take more time in mediation to clarify or expand upon your clients' position. The brief should be succinct and include a time line for facts and case law. If there is something you don't want the other side to read, you can always provide a confidential mediator's letter or email or call the mediator to be more candid about sensitive issues. Exchanging briefs can help educate your own client and opposing counsel on potential weaknesses in their respective positions. It can be more difficult to convince the client to accept a vulnerability of their case without understanding possible outcomes at trial.

Recommend or initiate pre-hearing calls in preparation for the mediation. This serves as an opportunity to give "behind the scenes" information on the case along with identifying certain dynamics not found in the brief. You may ask the mediator to reaffirm messaging, "good/bad/

ugly," with your client during the actual mediation session. You may also want to discuss the format of the proceedings, such as consideration of whether or not to have a joint session.

Joint sessions can work. Not all cases are appropriate for joint sessions; however, many times they can be an effective and productive introduction to the mediation process — and for participants to interact with the mediator. Today's joint session is an opportunity for the mediator to set the "ground rules," demonstrating their familiarity with the matter and to give each side a chance to answer their questions in front of each other before breaking out in caucus. If joint session is not appropriate at the beginning of the mediation session, consider whether it might be helpful midway or toward conclusion of proceedings.

It's also important to remind yourself and help your clients to keep an open mind. Mediation is flexible and constructive, but it is easy to only focus on the dollar amount without thinking about other nonmonetary solutions. Some of the most rewarding settlements can be facilitated through a better understanding of nonlegal bases for the initial dispute, restoration of business or personal relationships, policy or industry reform, or renegotiation of contract terms. Many times, clients will have to work together again and mediation can help to keep that relationship intact as much as possible. Creativity is encouraged in developing strategies for

settlement whether a complex business dispute or an emotionally charged matter.

If your case does not settle in the allotted time reserved for the mediation session, use this opportunity to work toward settlement by providing a summary of your clients' position to the mediator. Encourage the mediator to keep in close contact with the lawyers to explore options outside the initial discussions to see the matter through closure.

By incorporating some of these recommendations into your next mediation, you will demonstrate your legal skills and process expertise to your clients and to your partners. Why not become a mediation expert, thereby leading the path toward dispute resolution in the 21st century?

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