PREPARING FOR MEDIATION

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In my years of experience as a mediator and as a program administrator, the biggest single factor in preventing a case from settling in mediation is lack of preparation. As the old saying goes, *"failing to prepare is preparing to fail."* That is no truer than in mediation. Mediation does not generally require the hours and days of detailed preparation required by trial, but if you and your client are not ready, then it will usually be a waste of everyone's time.

Therefore, I have set out a summary of the things that a good attorney should think about, research, discuss or otherwise do to prepare the case and the client for mediation. These comments are about the broad use of mediation in the litigation setting--before filing, pre-trial, or on appeal.

I. ADVISING YOUR CLIENT ON MEDIATION

The first step in preparing a particular case for mediation is explaining to your client what mediation is, to make certain that the client's expectation will match what is likely to occur in the session.

First, mediation is a method of settlement, not a different type of litigation. Litigation is adversarial and focuses on who is right, whereas, mediation is cooperative and focuses on how to reach a mutually agreeable resolution. Litigation examines the "facts", which generally arise from the past, and applies a uniform set of rules and standards to determine how the parties will be required to interact in the future (e.g., pay a judgment). In mediation, the mediator does not decide the outcome of the dispute, as the total decision making power rests with the parties.

Second, the process is voluntary. Unless there is a court order or rule to the contrary, parties are generally free to participate in mediation as they see fit. If the process is not meeting the needs of one of the disputants, they are free to leave. (Even in a court-mandated mediation the parties should let the mediator know if they are dissatisfied and want to terminate the process.) It is voluntary also in that parties are not required discuss subjects that they do not want to address. The mediator controls the flow of the discussion, but largely the parties control the subject matter. In addition, any settlement is voluntary as the only resolution is one that all parties agree to accept. The mediator does not dictate or render a judgment or decision.

Discuss with your client the benefits of a mediated settlement. Mediation is faster than litigation. The case is settled on the parties' time table, not the court's. Mediation reduces animosity because

mediation focuses on cooperation while courts focus on deciding who is right. This is particularly important when the parties have an ongoing relationship, as is frequently true case in cases between vendors and customers or employer and employee. Mediation is private, with no public airing of laundry and the final settlement is usually not in the public record. In addition, as the case is settled with no adjudication, no precedent is set and the parties are not bound in any parallel litigation. Appellate mediation may also provide for the vacatur of lower court rulings. Probably the most significant advantage to mediation is the use of creative settlements. The solution is crafted to the particular needs of the parties and is not limited to what a court could order.

A client may be concerned that mediating is a sign of weakness and therefore need some assurance. Use of mediation does not indicate a lack of willingness to pursue any litigation option. In fact, by using mediation, a party is saying that they believe so strongly in their position, that if they can just explain it to the other side, they will be persuaded by it too. Clients may also be concerned about being required to accept a lesser settlement at mediation. As long as the client knows what they want and need going into the mediation, they have no reason to fear the results.

The client should simply reject any offers that do not meet their goals. The process is voluntary, so the client may decline any settlement at any time.

Even if mediation fails to produce a settlement, it will not have been a waste of time and money. Mediation helps both sides understand their own case and their opponent's case, which reduces later preparation and increases litigation efficiency, as well as the chances of subsequent settlement. Even if the entire case is not settled, mediation can be useful in settling some claims, negotiating procedural matters, calendaring and other issues.

Parties ask, "I have a strong case, why pay anything to settle?" Or at the appellate level, "I won below, why should I do anything to settle this case?" Another view of the situation is that the parties have a joint problem--they are both stuck in litigation. It is expensive, time-consuming, emotionally unsettling and somewhat unpredictable. The only way your client can get out of that situation is by working with the other side and both parties getting out of the problem situation at the same time. The party needs to ask "Is continuing the litigation better for me than any other possible settlement?" If no possible settlement is better than litigation, then you should contact the mediator and discuss the issue. Otherwise, you should proceed with preparing the case for mediation, looking for the settlement option that the other side may rationally accept and is best for your client.

II. Preparing The Case for Mediation

A. Know Your Case

Once the client understands the purpose and process of mediation, an attorney should prepare the case for the mediation. First, the attorney must know the case.

- Be able to summarize any relevant facts
- Have totals and general breakdowns of elements of the claims
- Compile lists of bills and expenses
- Provide written calculations of damages, injuries, and other claims
- Have copies of any documents in dispute
- Be able to summarize the relevant law

The second step is to apply the law to the facts. Make a realistic evaluation of the claims, factoring in the following:

- Difficulty in proving a claim
- Percentage chance of winning on a specific claim
- Percentage chance of a favorable ruling by a jury or on appeal
- Type and amount of award that a judge or jury may give

In making this assessment, it is important to remind the client that no claim to be heard by an adjudicator is a sure thing. My personal experience is that judges have broad discretion, and they use it. "On any given Thursday, any given judge can do any given thing he or she wants." While this is not exactly true, it is more accurate than the opinion of many clients that "there is no way I can lose." For confirmation that going to court is a roll of the dice, one only needs to consider Rodney King and the Menendez brothers.

One particular set of tactics to avoid in mediation is posturing and bluffing. It may have its place in litigation, and may be a valid tactic at the beginning of a mediation. But it has no effect on the mediator, as the mediator makes no decision. So articulating claims that cannot be substantiated may get the mediator on your side, but will more likely make the other party angry and distrustful of any offer to settle. It is rarely persuasive upon the other party to hear things which that party knows

to be false. For mediation to be successful, a party must be willing to deal with the bad parts of the case as well as the good. So, in preparing, tone down any impulse toward bluffing.

B. Analyze Your Options

Once you have helped the client evaluate the case, work with them to define your BATNA, which is an acronym for "Best Alternative To a Negotiated Agreement." What is the client's best alternative to settlement? Usually that is going to a hearing or trial, but it may be something else, such as arbitration, instituting a criminal proceeding, beginning administrative action, or, in appellate mediation, simply accepting the trial court's decision. What are the costs and risks of that Best Alternative? What are the benefits of that Best Alternative?

As an attorney, you can quickly analyze the trial and appeal options and costs, but you need to discuss your analysis with your clients in detail so that they can understand exactly what they will be expecting if the mediation does not produce a settlement. They need to be aware of the pitfalls of their case and will start to understand why they should be willing to modify their expectations.

The reason for this analysis is because, presumably, at the mediation each party will be presented with an offer for settlement. A client cannot know if the offer is a "good deal" unless they understand the costs and benefits of whatever the alternative is. If litigation is most likely going to produce a risk-adjusted average net benefit of $40,000 (after expenses and attorney's fees), then any offer netting over $40,000 is a better deal than going to trial and therefore should be accepted.

C. Know the Other Party's Case

The next stage in the preparation for the mediation is to know the other party's case. Summarize the essential facts that support their claim. Explore the interests of the other party, asking "What do they really want or need out of this case?" Is it money, vindication, an acknowledgment that they are/were right, or punishment of your client? Analyze the claim from their prospective, trying to figure out how they see the case. Then ask, "What offer can they make that would surprise me?" Is there anything that they might offer that would catch you off guard? Also, think about what offers they expect from you and what offers you might make that would surprise someone standing in their shoes. Be ready to assist the mediator in asking the other party tough legal or factual questions by listing things on which your client needs clarification or that you believe will be important in challenging the other side.

D. Contacting Other Persons

Witnesses may be allowed but usually not required or needed. If the other party wishes to see or hear a witness, most likely the mediation will need to be continued the witness can be interviewed or deposed. The usual presentation of factual data is by way of documents, as listed above. It may also be helpful to contact the mediator in advance to discuss procedural details. Give the mediator an overview of the case, what are the issues that concern the parties. This allows mediator to consider methods and strategy and review particularly relevant/controlling case law, if appropriate. Warn the mediator of pitfalls due to personalities or history of claim, particularly sensitive issues sources of extremely bad feelings. These conversations can be held as you discuss times and locations for the mediation sessions.

D. Planning Strategy

Consider the presentation of the case. It needs to be effective, convincing and persuasive. It also needs to deal with your weaknesses and their strong points. This can be done by acknowledging the weaknesses or rebutting issues that may seem to be strengths of the other party.

The attorney also must put the numbers in the case, that is, decide what the negotiating strategy should be. Determine a bottom line, a position beyond which the client will not go. Usually this is determined to a large extent by your BATNA. Then select a starting point or the opening offer, which must be supported by your evaluation of the case. If the primary claim in the case is worth $100,000, starting at $500,000 does nothing but prolong the mediation and irritate the other side. To support a starting position, develop a list of reasons why the other side should accept your evaluation of the case and settle for your offer.

Next, decide on concessions you will be willing to make. What information does your client need, and what kind of concessions can be made when the information is exchanged? Is there anything your client can give, at low cost, that the other side may find valuable such as an apology, a resignation, release from future claims, a job, training, a good reference, insurance coverage? Moves in a negotiation should not be made just to keep the process going, except in rare cases. If a client is giving up the demand for money, medical costs, future employment, or other valuable

considerations, then the other side should be giving up value as well--information, positions or claims.

In planning the negotiation, it is sometimes helpful to develop objective criterion by which the claim can be analyzed. Objective criterion are methods or procedures by which not just your case but all similar cases could be evaluated fairly and in a manner which both sides can agree in advance will produce a reasonable result. If you can develop such criterion, but it does not support your offer, then your offer needs to be modified.

While mediating, the attorney and client need to focus on the problem, not the people. In other words, concentrate on how to resolve the claim appropriately, not on getting even with someone who has wronged them. Painting the other party as a fraud or cheat obscures the search for a resolution, as the accused defend themselves rather than try to resolve the case.

The client needs to consider the needs and objectives of the other party as well as their own needs. They then try to develop novel or creative ways to resolve the problem, satisfying as many needs of both parties as possible.

III. Mediation Procedure

The first detail is to select a mediator. The North Carolina Dispute Resolution Commission maintains a list of certified Superior Court mediators and Family Financial mediators. The DRC may be contacted at http://www.aoc.state.nc.us/www/drc/index.html or 919-981-5171. The mediator works with the parties directly to establish the time and place of the mediation. In family matters, a session usually lasts about two hours, and a mediation usually requires three to six or ten sessions, depending on the complexity and the level of disagreement. Superior Court mediations may take from one hour to all day, but two to four hours is the norm. In complex cases, the parties may meet several times over different days. Some mediation may take weeks or months to complete.

The mediator's pay is usually split between the parties, to maintain the air of neutrality and one side does not think that the mediator is working for the other person. In family cases the mediator usually is paid at the end of each session, although some mediators will run a bill. The procedure, what is discussed and when, is usually controlled by the mediator. Therefore the parties need to discuss up front any special requests or problems.

IV. Ethical Issues in Mediation

The confidentiality of the conference is very important to the parties' having trust in the mediator. Rules of ethics for mediators provide that anything said to them is confidential unless otherwise agreed. What is said to a mediator in private will not be revealed to the other side without express permission and what is said in the presence of both parties will not be revealed to anyone else. The admissibility of things said in the general sessions are covered by Rule of Evidence 408, which covers settlement discussions. Therefore, the parties should not disclose to any court the substance of any mediated discussions.

At times a party may need to discuss procedural or substantive aspects of the case with the mediator, either before or after the mediation conference. It may be helpful to contact the mediator in advance to discuss procedural details, or to give the mediator an overview of the case, including the issues that concern the parties. This allows the mediator to consider methods and strategy and review particularly relevant/controlling case law, if appropriate. A party may want to warn the mediator of pitfalls due to personalities or history of the claim, particularly sensitive issues and sources of extremely bad feelings. Ex parte communications are permitted as the mediator makes no decision. Therefore there is no need to notify the other party if you talk to the mediator. However, the mediator may feel compelled to reveal the fact that the two of you talked. If the content of the discussion is to be revealed, the mediator must secure your permission first.

The mediator must remain neutral at all times and should excuse herself if she is no longer perceived as neutral. Just like an attorney, a mediator cannot gain any interest in the claim being mediated.

Mediation is terminated by either the mediator declaring an impasse, or a resolution. When it becomes apparent that no progress will be made, the mediator is obligated to declare an impasse. The parties and mediator may decide to terminate the conference when they see that continuing would not be an efficient use of time or money.

Since mediation is effective when everyone has full and candid information, a settlement based on fraud, trick or deceit is subject to failure. If the mediator becomes aware of critical information that is known only to one side, he may elect to terminate the mediation, although he may not reveal the information to the other side without prior permission.

A mediator is not to give legal, medical, financial or any other kind of professional advice or information. The mediator should ask probing questions but should leave it up to the parties to make decisions on how to resolve the case.