How to Prepare Your Client for Mediation

Deborah A. Ferguson

Editor's Note: This is the second of a three-part series.

Our role as lawyers continues to evolve as more legal disputes are resolved through mediation. Less than five percent of civil cases go to trial. Consequently, your pretrial strategy should reflect the strong likelihood that the case will be settled. You must prepare for the near certainty that you will sit at the table with a mediator, and perhaps the opposing side, to negotiate a settlement. Civil trial lawyers need to be proficient in representing clients in a mediated settlement process. Part of that preparation means preparing your client, which should begin long before the actual mediation. While Part I of this series examined the benefits of a mediated resolution, Part II suggests how you can best prepare your client for a mediation. Part III will address practice tips for attorneys participating in a mediation.

A successful mediation allows your client to choose between either continuing with litigation or ending the matter by way of the most favorable settlement option available.

Explain to your client how mediation works

The mediation process focuses on solving problems and on the future. It is fundamentally different from an attempt to find fault, which is what is at the core of a legal adjudication. Many of our clients, if not most, have never gone through mediation. In order to be fully prepared, your client must understand the basic difference between an agreement and a judgment. While most clients understand that mediation does not directly involve the court, they may still expect some form of adjudication of the facts, which will not happen. You may want to remind them that while a judge (or arbitrator) looks at the past and decides who is right and who is wrong, in mediation, the parties work with a mediator to resolve the conflict by way of a voluntary agreement.

It is also important to discuss with your client what it means to be successful in mediation. You should point out that a successful outcome in a mediation will not look like a favorable court judgment, where one side prevails, and the other side does not. Instead, in mediation there are no clear winners and losers. A successful mediation allows your client to choose between either continuing with litigation or ending the matter by way of the most favorable settlement option available. Your job as counsel is to get the best proposal on the table from the other side. Then your clients can weigh the offer and the finality it brings against the cost, effort, and uncertainty of pursuing potential recovery pursuant to the decision of a court.

Take the time to discuss with your client a range of acceptable outcomes. Fixating on a bottom line dollar amount may come back to haunt you. Once your client hears an amount that must be paid or received, it may be difficult to move them from that anchor. Mediation often reveals new facts, or puts other important variables in a new light, requiring reassessment of the value of the case. Do not get locked into an absolute position that may no longer be viable to pursue or defend.

Because a mediated settlement often involves something other than money, brainstorm with your client about what a customized resolution of the conflict might look like. For example, would an apology, future business contracts, or a structured annuity be alternative means to a compromise? Fleshing out these options and doing research on their feasibility in advance greatly increases their potential usefulness in reaching an agreement during the course of a mediation.

Emphasize to your client that compromise will be necessary

Make sure your client understands and accepts that mediation will involve compromise from both sides. If your client is unwilling to yield on any given issue, then litigation might be the only path ahead despite the fact that it might not bring your client to his or her desired destination. Let clients know that if they terminate the mediation process, litigation will, in fact, proceed. If you reach this juncture, ask them to weigh the inherent uncertainty of litigation, along with the relative strength of their case and an assessment as to the range of outcomes. Mediation allows deals to get done because one side is not the winner and one side is not the loser. Both parties walk away with something they can live with.

At a recent advanced mediation training, a retired judge told the tale of a mediation he conducted in a complicated intellectual property case. Late in the day during a caucus session, tempers flared and negotiations reached an impasse. The mediator suggested to one of the parties that a trip to Wal-Mart would be useful. The bewildered party inquired, "Why?" "To take a look at your jury pool," he replied. While much of the world emulates our jury system as the gold standard of justice, it presents considerable challenges in a complicated civil case. This judge's point was that it is difficult to effectively present complex litigation even to the most experienced jurist, let alone to a random jury of citizens. Your client should consider this reality.

In these discussions, ask your client to consider the drain that litigation will impose on his or her time, budget, and energy and to carefully weigh this against the resources that a mediated resolution could potentially save. Point out that even for the victorious, a judgment may do little to either address the underlying problem that created the dispute in the first place or to stop it from reoccurring.

Discuss the objectives of the mediation

Manage your client's expectations so that they are realistic and avoid an "all or nothing" perspective. The ideal result of the mediation is the full settlement of the case. However, even if the mediation does not resolve all the claims between the parties, encourage your client to be prepared to take an incremental approach. Mediation can narrow the issues and get some claims off the table. In the

event the case proceeds to trial, this will allow the court to focus on the primary dispute and avoid having to resolve expensive and distracting ancillary issues.

In multifaceted disputes, an initial mediation might be only one of several sessions, as part of a longer negotiation process. You should prepare your client to take the long view and to not get discouraged or frustrated if a single mediation session does not resolve the case. At times, negotiations reveal that crucial pieces of information are missing, and more facts must be gathered before the parties can enter an informed settlement. Likewise, a core disagreement on a fundamental issue of law may crystallize.

Instead of reverting back to a litigation mode, explain to your client that this can present an opportunity to work with the mediator to carve a path forward and avoid the impasse. After defining the issue that is blocking settlement, a game plan might be developed to continue the process and shed more light on the issue without returning immediately to a full litigation track. This could entail an agreement between the parties to engage in focused discovery on the disputed facts, to hire a third party expert to weigh in, or to proceed with the joint testing of a product or an accident reconstruction. Rather than abandon the negotiation process, an unsuccessful attempt at resolution can create a plan to move settlement forward.

Even if the mediation does not resolve the litigation or streamline discovery, it can allow you and your client to learn more about the other side of the case. Mediation often results in new insights into the conflict, which did not come to light through the traditional discovery process because the right questions were not asked. Ask your client to listen carefully throughout the mediation because it presents a unique opportunity to hear both parties' perspectives. Revealing information is often unearthed in the separate caucus sessions or opening statements. Fully participating in the mediation may also increase clients' objectivity because they will be put in a position to have to consider the soundness of their claims or the defenses.

Explain the structure of mediation and inevitable downtime

Although there is no set formula, a mediation may begin with a joint introduction by the mediator, to both parties and counsel. The mediator will typically explain the process and the confidential nature of the proceedings. Then the parties go into separate caucus sessions, with the mediator working as an intermediary between them.

However, sometimes a mediation takes the following regrettable course. Counsel and client are ushered into a windowless conference room in the morning by a receptionist only to sit and wait for hours for the mediator to emerge from an initial caucus session with the other party. Frustration mounts as the hours drag on. This time is unproductive, as you have not yet even seen, let alone been heard, by the mediator. Hopefully this scenario can be avoided by a pre-mediation discussion with the mediator and a request for introductions before caucus sessions begin. But address the inevitable downtime inherent in caucus sessions with your client in advance, so they know what to expect and come prepared to use the time productively.

Consider the pros and cons of a joint session

You should also discuss with your client whether you will request that the mediator conduct a joint session with the opposing parties, or if you prefer the entire mediation take place in separate caucuses. If a joint session is planned, make sure you are clear as to who will make opening statements: counsel or the parties themselves. Although one size does not fit all, the parties' attorney typically should do the talking. Counsel is in a better position to succinctly relay the merits of their client's story and avoid the emotions the client might bring to the situation. As counsel, minimize argument in your opening statement, so that the joint session does not disintegrate into grandstanding. The mediator should also be prepared to take firm control of the joint session, and promptly end it, if that should occur.

In some jurisdictions, joint sessions are routinely conducted. They are not as common in Idaho, but Idaho attorneys may, on occasion, want to consider participating in a joint session, given the right case and the right mediator. Despite the likely initial discomfort of the situation, it can provide you and your client an invaluable opportunity to hear the best arguments of the other side. If the case does go to trial, the joint session might prove to be an important trial preparation step for your client

Despite its potential risks and awkwardness (namely that the mediation gets off to a poor, hostile, and polarizing start), a joint session can also provide for the basic human need to be heard and acknowledged, even if it is through counsel. This can help the parties look beyond the positions advanced in the litigation to the true interests of both sides. Do not underestimate how a showing of dignity and respect, or even simply recognition, can change the dynamics of a case. This is especially true when a plaintiff is challenging the decision of a large business, institution or government agency they perceive as more powerful. Addressing the parties' need to be heard and to be treated respectfully can create a more reasonable and flexible negotiation process. With the consent of counsel and after the right preparation, joint sessions can be a powerful mediation tool and merit your consideration.

Involve your client in the preparation process

Lastly, involve your client in the mediation preparation process. A successful and positive experience is far more likely if they understand the process, as well as the goals and possibilities of mediation. Even if mediation does not result in a resolution of all of the claims, it can go a long way in refining the issues between the parties. Preparation will help clients assess the risks and merits of their claims. It may also provide a reality check and adjust their expectations as to outcome.

In summary

In most of your civil cases, you will represent your clients in a settlement process, usually mediation. Advance preparation is crucial to a successful mediation, and preparing your client is an essential part of that process. Don't skip this step. You have a sizable advantage in securing a good result if you and your client arrive well-prepared to mediate.

About the Author

Deborah A. Ferguson *specializes in civil mediation and litigation. She has 26 years of complex civil litigation and trial experience. Formerly an Assistant United States Attorney, she has litigated hundreds of civil cases for the Department of Justice over the past 20 years. She recently attended the Straus Institute for Dispute Resolution at Pepperdine University School of Law and completed advanced training in mediating cases in litigation. She is on the roster of certified mediators for the United States District Court for the District of Idaho and for all Idaho State Courts. Deborah A. Ferguson served as the President of the Idaho State Bar in 2011.*