

Trust the Process



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Take a moment at day's end and ponder the improbable: Your client, opposing counsel and the judge are all satisfied with the outcome with one of your most difficult cases! A mediation can provide a process where the improbable happens.

Mediators are there to help assist you and your client resolve problems in a cost efficient, time saving and mutually beneficial way for everyone.

Mediation allows your client a forum to air his or her issues and a chance to be heard. It gives parties the opportunity to actually sit across the table from one another to ask questions, explore risks, confront weaknesses, vent frustrations, share feelings and discuss how others may neither see nor hear a story in quite the same way they do. This process can be more satisfying than the courtroom experience. There is an opportunity for creative and flexible problem solving, which is not possible with court determinations.

The role of the mediator is to assist the parties to realistically understand the benefits of resolving the case without going to trial and assist them in making the difficult decision to settle. The role of the mediator is analogous to the director of a play.

Successful mediations begin with an understanding that all parties and their lawyers come to the table in good faith. This means the parties and the lawyers must trust the mediator and be willing to be honest about the weaknesses and strengths of their position.

Mediators expect lawyers will represent their clients zealously, but at the same time mediators require lawyers to listen to suggestions and seriously consider the mediator's view. Lawyers need to let mediators do their job. Lawyers, by nature, like to be in control of the situation and are trained to not ask questions they don't know the answer to. Successful mediations are not the ones where lawyers try to control the mediation process by making ultimatums, walking out of the mediation, focusing on legal issues, or refusing to listen to creative solutions to the problem. In the best mediations, lawyers leave their litigation mode and keep an open mind, participate in the exercises, consider the creative or risky proposals and trust the media-

tor's methodology and suggestions. Following the mediator's guidance means you and your client have a better chance to leave with a resolution.

Based on many years of experience as a judge and now as a private mediator, here are my tips for a successful mediation.

All Parties Must be Physically Present at the Mediation

The participants at the mediation must include the mediator, parties, attorneys and the person with settlement authority (i.e. insurance adjuster or in-house counsel). Some optional attendees may include supportive family members and expert witnesses. It is absolutely crucial that the person with authority attends the mediation. The decision-maker needs to see, hear and feel firsthand exactly how the plaintiff was injured and the affects of the injury upon her life. How can you tell if someone is lying if you never meet him? Often times the mediation is the first time the parties meet and it is very compelling to have the parties sitting across the table from each other listening and watching one another talk or vent about their common dispute. The lawyers should also have the complete and accurate subrogation and lien information and have the lien holders at the mediation or available by telephone.

Choose an Experienced Mediator with Mediation Training

The most effective mediators are those who have experience and training in mediation. There are two types of mediators: facilitators and evaluators. A facilitator helps the parties understand each person's position and never evaluates the case. On the other hand, the evaluator is a mediator who provides an opinion on the likely outcome or an independent unbiased evaluation to one or both of the parties. The truth of the matter is there is a large grey area between these two types of mediators. Some mediators will never provide an opinion of the likely court outcome of a case because they fear they may lose their neutrality in the mediation process. It may be useful to interview the mediator and ask about her particular style and philosophy of mediation and explain to the mediator what style of mediation the parties believe will be most helpful to their clients.

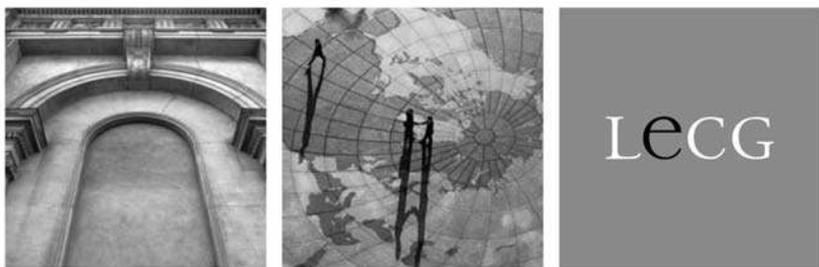
Mediate Only When the Case is Ripe

Generally, the best time to mediate is when the parties have enough information to assess liability and damages. Usually this is after discovery is completed, the expert reports have been exchanged and shortly before trial. However, there are no hard and fast rules about the best time to mediate a case, and there are exceptions when waiting until late in the process is not a good idea. Some factors to consider when determining when is the best time to mediate: the relationship of the parties; the cost of litigation; pending summary judgment motions; emotional and financial needs of the parties; privacy; and expediency. The best person to know when to mediate is the lawyer handling the case. Lawyers know their clients best and have done a cost-benefit analysis of the case. If one party is reluctant to attend the mediation, it may be helpful to let the reluctant party choose the time and/or choose the mediator. When a party chooses the mediator, it often begins to take ownership over the process, become more trusting of the mediator and more willing to participate. It is commonplace for one side to suggest the other side choose the mediator.

Another important consideration is the pendency of dispositive motions. If one party feels confident it will prevail on a summary judgment motion, then the best time to mediate the case may be after the summary judgment is ruled upon by the court. It is difficult during a mediation for a party to consider the interest of the other party and identify the other party's perspective when one side persists on arguing the merits of its summary judgment motion. However, if the case is a complicated one and requires an extensive amount of work and money to prepare the summary judgment motion, then the parties may prefer to mediate before filing the motion.

Prepare Your Client for the Process

A typical mediation has three parts: the opening session, the caucus session and the settlement session. The opening session begins with the mediator speaking first about the mediation process and the role of the mediator and the parties. This is also an opportunity for the mediator to put the parties at ease and encourage them to be active participants in the process. Following this, the attorneys and parties will give opening statements. The purpose of the opening statement is to allow the parties and the attorneys to hear firsthand from opposing counsel about the other side's position in the dispute. The process is helped if lawyers are willing to acknowledge at least some of the weaknesses of their case at this time. It is important the lawyer be firm during the opening statement but polite. It is common for one of the parties, usually the party claiming injury, to feel angry or offended by comments made by opposing counsel in the opening statement. For this reason, some mediators no longer allow the parties to give an opening statement. But clients should



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know that there will be an initial joint meeting and difficult issues may be raised. Preparing them for the process will help them participate and not become discouraged early in the process.

In addition to preparing your client for the opening, you should explain the caucus portion of the mediation. During the caucuses the mediator will meet separately and privately with each party in order to clarify information and to better understand the parties' interests, concerns and fears. The caucuses will last anywhere from one half hour to two hours, depending on the type of case. The mediator's work truly begins in the caucuses where the mediator will explore with the parties the following issues: possible outcomes of the dispute, creative settlement options, the time and expense of litigation, uncertainty of litigation, relationship of the parties, strength and weaknesses of the case, and the parties' motivations to settle. Frequently, lawyers and clients will have the best and most creative solution to resolve the dispute. It is therefore important for the parties and the lawyers to begin focusing on creative solutions to the dispute prior to the mediation.

Lawyers should not assume their clients understand the mediation process. It is important for the lawyer to explain the mediator's role carefully, making it clear the mediator is not there to decide the

case but rather is there to facilitate the parties in reaching a settlement. The lawyer should also explain that during the caucuses the mediator may appear at times to be taking sides with one side or another or may appear to be playing the role of devil's advocate. These techniques are all part of the job of the mediator to help the parties deal with and solve problems.

It is recommended the attorneys give some advance thought to the documentation of the settlement. If an exchange of money resolves the issue, the settlement agreement will be simple. However, settlements often require additional clauses such as confidentiality clause and releases. It is not a good idea to leave these issues until the end of the mediation because confidential clauses and releases can be impediments to settlement.

Consider an Apology Where Appropriate

Lawyers should never underestimate the value of a written or oral apology during the opening statement. This is particularly true if it is from someone in upper management or from the person whose actions are at issue. Keep in mind that while legal disputes often appear to be about money, there is always some emotional reaction looming in the

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issues in adr

background. For example, a plaintiff who feels she has been wrongfully terminated feels she has been robbed of something. She is angry and humiliated that she heard about her termination through the grapevine via an email from another employee. The defendant employer can help restore this plaintiff's sense of dignity and self-respect by acknowledging the plaintiff's humiliation and admitting that the communication could have been more direct in the situation. This acknowledgment or apology, if properly worded, will set the tone of the mediation from the beginning and the defendant may garner good will in the process. Plaintiffs frequently assume the defendant does not appreciate fully the harm done to them or understand the myriad of emotional responses they are experiencing as a result of the dispute.

Consider Allowing Your Client to Speak

Many attorneys do not want their clients to make an opening statement. They are warned about what will be said or that the client may be emotional or angry. Advising your client not to speak in the opening is usually a mistake. One of the guiding principles of mediation is that it is a process that

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pitfalls

cancellation of the domain name or transfer of the domain name to the trademark owner. Companies seeking damages, however, will have to file suit in federal court, which can be much slower and expensive.

Intellectual property audits and due diligence can help companies develop domain name registration and renewal strategies and identify any potential issues.

Business transactions almost always involve intellectual property rights. IP practitioners are a valuable asset in business transactions, helping companies and non-IP practitioners navigate this complex and rapidly developing area of law. The pitfalls detailed above are just a few (of many) that you may encounter in a business transaction. Identifying and avoiding these pitfalls are important steps to ensure a smooth and successful transaction. ☐

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empowers the parties to jointly resolve a dispute. In order for this to occur, the parties must be active participants in the process. This means the parties should be prepared to tell their side of the story. Often times the opening statement is the first time the parties have met or have spoken in a long time. Both parties need to speak and vent emotions so each party can begin to determine the strengths and weaknesses of each case and determine what the resolution of the case will mean to each. Parties often speak more earnestly than lawyers about a situation they personally were involved in. This earnestness can go a long way in convincing the other party to be more understanding of the true issues in the case as well as being cathartic for the parties.

Do Not Litigate at the Mediation

There have been occasions when a lawyer in a personal injury case shows a videotape or a Microsoft® PowerPoint® presentation in the opening session to illustrate the significance of the plaintiff's injuries. When planning to make such a presentation, you should inform the mediator and the other lawyer prior to the mediation. There is nothing worse than starting a mediation with a conflict or having one of the parties feeling like it was "sand-bagged." The most successful mediations begin with the parties and lawyers cooperating and communicating with each other. Lawyers must avoid the natural tendency to or the appearance that they are at the mediation to fight and win the lawsuit. The goal of mediation is not about winning or about the skills of the lawyer. Rather the goal is looking for a path to resolve the issues in a way that is in the best interest of the client.

Know the Applicable Ethical Rule

Many states have rules aimed at out-of-state lawyers representing clients in mediations. On February 1, 2007, Ohio adopted Rule 5.5 of the ABA Model Rules of Professional Conduct. Ohio Rules of Professional Conduct Rule 5.5(C)(3) now permits a lawyer admitted to practice law in another state to perform services in Ohio on a temporary basis if those services are related to a pending or potential arbitration, mediation or other ADR proceeding.

Always Do a Mediation Summary

Most mediators require the parties to prepare a summary with the background of the dispute. If the mediator does not insist upon a summary, you should do one anyway. Provide the mediator with relevant correspondence, pleadings and other relevant documents. If a summary is mandated, be sure to ask whether it should be exchanged with the other side prior to the mediation or submitted to the mediator confidentially. Most mediation statements are exchanged between the parties. The more each side knows about how the other side views the dispute, the more likely the dispute will settle.

The following information is useful to include in the mediation summary:

- Factual summary and procedural status of case
- Identification of key factual and or legal disputes
- Copies of summary judgment motions pending
- History of settlement discussions
- Suggestion for resolution
- Your view on barriers to settlement
- Your view as to the emotional issues each party is experiencing
- Prior courses of negotiations
- Damages information

Trust the Process

More than 90 percent of the cases mediated settled at the mediation or shortly thereafter. It works. It is vital to a successful mediation that the parties and the lawyers trust the process. One of the most common impediments to settlement is attorneys who don't trust the mediation process and want to control the mediation. They hold back valuable information, they won't make concessions and they fight to keep control of the process. Mediators are there to help you, not hurt you or your client. Choose someone you trust. Then trust the mediator to design and guide the process. After all, that is why you hired them. ☐

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