

APPROACH MEDIATION LIKE A COURT TRIAL

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Since most civil cases settle rather than are tried, mediation of those cases assumes critical importance because it becomes, in effect, your “day in court.” Thus, attorneys should approach this phase of the litigation process as if it were a court trial, rather than just another settlement conference, because there is a direct correlation between extensive mediation preparation and the realization of expectations. The following are recommended steps, many of which are used in trial preparation, for achieving the best results at mediation for your clients:

Decide beforehand the goals of the mediation. Most usually, settlement is the *raison d'être* for mediation. However, even if the parties are too far apart on that particular occasion, mediation can be useful for conducting informal discovery, setting the stage for additional work that needs to be performed (such as expert depositions), resolving discovery disputes and posturing (for example, attempting to intimidate or impress the opposition by command of the applicable facts or law). Consequently, consider beforehand how you can benefit from the mediation even if the matter does not settle on that occasion.

Determine when the mediation should be conducted. The timing of a mediation can be almost as important as the facts of the case. For example, it is generally accepted that mediation immediately before trial results in a settlement because of concerns about additional fees and costs and the impending uncertainty of trial. So, rather than wait for the court to order or suggest that you mediate, arrange for that process when it is most advantageous to your client.

Mediating before the complaint has been filed is the optimum time to save fees and costs. The party who is more knowledgeable about the facts also has an advantage. But such knowledge can be an impediment to settlement if the other, less informed side cannot confirm the truth or existence of those facts. Thus, the party in control of the facts should consider whether or not to tell the opponent about them. Further downsides of pre-filing mediation are that the facts and contentions have not been developed by either side and there may not yet be insurance coverage.

Mediating soon after the complaint has been filed, like pre-filing mediation, saves fees and costs, although not as much as the latter, but has the benefit of showing that the plaintiff is serious about the claim. Filing can also bring about a covered claim.

Mediating immediately before or after a motion for summary judgment/summary adjudication has been filed can also be effective. If the motion is supported by sound legal and factual contentions and might be granted, the party opposing it should attempt to settle the case before the motion is to be heard. At the same time, the moving party should take advantage of this opportunity. After such a motion has been denied, the opposing party is generally more

emboldened and in a better position to claim that it has a good chance to win at trial.

Lastly, as mentioned above, the uncertainty of what a jury might do and the fear of additional fees and costs, especially if the trial will be long or there is a prevailing party attorney's fee clause or attorney's fee statute, are prime reasons for settling "on the court house steps." Additionally, mediating just before trial is an opportune time because both parties know each other's theories and can accurately assess the pluses and minuses of trying the case. The downside of a delayed mediation is it allows the opposing party to become familiar with the facts and increases the client's expenses.

Decide who the mediator shall be. Prepared counsel do not go to trial without learning about the judge who shall preside over the case. Unlike trial, you have the opportunity to both learn about and choose who the mediator shall be. That person should be knowledgeable about the process and the applicable law. It is also helpful to select a mediator whose style fits the needs of the case. In other words, do the parties need a mediator who is forceful or compassionate or can operate in both extremes? If you are not personally knowledgeable about the prospective mediators, talk to them ahead of time about their backgrounds, experiences and styles.

Evaluate opposing counsel. Before the mediation, form a good idea about the strengths and weaknesses of opposing counsel. Is this person experienced, knowledgeable and prepared or flying by the seat of his or her pants, blithely ignorant of what it will take to try this case? Such information is invaluable in putting a value on your case and assessing the risks of going to trial.

Be familiar with the legal principles at issue. Just as you would before going to trial, review both the Judicial Council Civil Jury Instructions (CACI) for the elements of the causes of action in question and the leading legal texts (e.g., the applicable annotated code; Witkin-Epstein; Miller & Starr) for additional relevant law. CACI is particularly important because it lays out the black-letter law that a mediator may rely on in evaluating the legal merits of your case and, perhaps, also question you about. Additionally, know the standards and rules that apply to mediations. In particular, be familiar with the requirement in Rule of Court 3.874 that the parties, their attorneys and insurance representatives with authority to settle or recommend settlement must attend all court-ordered mediations in person, unless excused by the mediator, and that all communications during the mediation process and all writings prepared expressly for those mediations are confidential, pursuant to both Evidence Code sections 1119 et seq. and *Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1 and *Rojas v. Superior Court* (2004) 33 Cal.4th 403. Note that the attendance requirement does not apply to voluntary mediations which are not yet covered by any formal rules.

Bring copies of case law that is particularly appropriate on the issue of liability or damages but may not be well known to the mediator and opposing counsel.

Analyze the factual and legal strengths and weaknesses of your case. We all know the strengths of our cases; more often we overlook the weaknesses. Just as you should be prepared to meet those deficiencies at trial, be ready to discuss those failings with the mediator because

he/she will surely raise them when meeting with you in a separate caucus. The best way to anticipate this dialogue is to write out the elements of every cause of action and then, in adjoining grids (one each for the witnesses and the physical evidence), insert all of the admissible evidence in support of every element. Be prepared to defend any cause of action that lacks evidentiary support, uses evidence that is arguably subject to legal attack or is supported by a less than credible witness. As an example, be ready to explain why a witness is believable despite having made many inconsistent statements at his/her deposition; how you can establish the foundation that the opposing party made a damaging statement when you do not have a witness who heard those words or can lay the foundation for a business record from a foreign country when the custodian of the record is not available. Having gone through such an analysis, you will be prepared to intelligently discuss and even counter or minimize the mediator's comments about particular problems.

Decide whether or not to reveal a “smoking gun.” Tactical decisions are not unique to trials. A major tactical decision in the mediation process is whether to allow the mediator to advise the opposing party about a previously undisclosed “smoking gun” (usually, a factual issue although it can also be procedural) which supposedly could have an impact on the case at trial. There are no clear answers to whether you should authorize revelation of that potent issue or reserve it for trial, but the answers to the following factors will help in resolving this conundrum: Is the information really case dispositive? Will it turn the judge or jury to your side or is its value exaggerated? Will the information be discovered ultimately by a subsequent interrogatory, inspection demand or deposition? Is the information inadmissible and, thus, could never be used at a subsequent trial? Would the financial cost of developing the “smoking gun” at trial (such as expert testimony and related tests) be prohibitive? Is the probability of a trial not likely because of client reluctance, financial costs or the strong possibility that the case cannot be won or, alternatively, will the matter most likely be tried? In the last instance, the surprise evidence, under most circumstances, should not be revealed.

Prepare the client for the mediation. Just as you would prepare your clients before calling them as witnesses at trial, advise your client before mediation as to the purpose of the proceeding, its procedures (such as confidentiality and the possibility of a joint caucus), how to dress, where to park and how to act in both a joint caucus and in a separate caucus when the mediator is present. Discuss with the client whether he or she should take an active part in the mediation and, if so, what questions the mediator may ask him or her.

Discuss settlement with the client. Discuss beforehand with the client the possible demands and offers that should be made to resolve the matter. You most probably have an opening offer or demand in mind but have you also thought about how far you and your client are prepared to move before you can go no further? Such planning will make the negotiation process much easier. Consider also the worst case scenario if the matter does not settle. While there is nothing wrong with being confident about your case, think ahead to what will have to be done to try the case if it is not resolved at mediation and, more importantly, realistically evaluate the chances of achieving your goals at trial.

Consider whether or not to agree to or object to a joint caucus. Mediators should talk to the attorneys early on about whether or not to hold a joint caucus at the beginning of the process.

Consider its advantages and disadvantages before agreeing or objecting to the procedure. A joint caucus is beneficial where the parties and their attorneys, either because of the early calendaring of the mediation or incomplete discovery, do not have a good understanding of the other side's legal theories and facts. In this situation, a joint meeting, under the guidance of the mediator, is an excellent way to learn about the opponent's facts and contentions. The joint caucus also provides the parties with an opportunity to establish positive lines of communication, which can be beneficial in settling the case. A joint caucus provides a vehicle for all involved to impress each other with their respective legal abilities and to assess or size up the opponent. When the facts are highly technical or complex, a joint caucus, under the mediator's supervision, is helpful in defining or refining the nature of the dispute. A joint caucus may also be useful when one or both parties believes that expressing their thoughts or emotions to the other side is a necessary part of the healing process.

Alternatives to a joint caucus at the beginning with everyone present is a joint caucus with only the attorneys involved or a caucus held later on in the mediation to consider factual or legal issues that have arisen during the process.

A joint caucus has little or no value when the mediation is being conducted shortly before the trial and the case has been fully litigated so that the parties and their attorneys have a full understanding of the other side's factual and legal arguments or there is a limited amount of time to conduct the mediation and, in the opinion of both the mediator and the participants, the available time can be better used in separate caucuses with the participants or one or more of the attorneys advises that there is great hostility between the parties, which will be exacerbated if they are brought together in one room.

Determine whether any witnesses, other than the client, should attend the mediation. As in a trial, consider what witnesses, other than the party, will best present the factual portion of your case. For example, is there a credible witness who can corroborate the client's version of the facts (as in an employer-employee dispute) when the client's credibility is under attack? Alternatively, consider using a declaration when the witness is unavailable. Such possibilities should not be limited to lay witnesses. While experts are generally used only in construction defect mediations, they can be effective whenever issues of liability or damages rest substantially on their opinions and their identities are already known to the opposing party.

Use demonstrative evidence and other illustrative aids. Experienced lawyers go to trial with demonstrative evidence or illustrative aids that effectively emphasize the critical factual or legal parts of their cases. Such evidence can clarify or amplify the testimony of witnesses, make abstract concepts real and more vivid and make a case look stronger than it might really be. It is for those same reasons that demonstrative evidence should be used at mediations. Enlarge pictures that depict accidents and injuries. Use PowerPoint or other comparable technology to highlight key language in contracts, correspondence and deposition testimony. Provide a chronology or time line to clarify confusing events, such as the dates in a construction defect or legal malpractice claims. Produce a video that dramatically emphasizes an important aspect of your case (for example, the day-in-the-life of the injured plaintiff or portions of a witness's deposition). In other words, make your case more interesting and powerful by playing to the mediator's visual senses. Finally, all demonstrative evidence should be legible (whether the

writing be in a letter or picture), unambiguous and presented in an organized fashion so that its desired impact is not lost on the mediator.

If a particular exhibit has been prepared exclusively for the mediation and shall be shown to opposing counsel, make certain that that person knows that the exhibit remains confidential pursuant to *Rojas v. Superior Court* (2003) 33 Cal.4th 407.

Provide an interesting and timely mediation brief. The mediation brief is very much like a trial brief; it should both “sell” your case and impress the mediator with your knowledge of the facts and law. Present the theme of your case in a brief opening paragraph and then follow it up with a review of the pertinent facts that tell the mediator why you shall prevail at a future trial and are, therefore, entitled to a favorable settlement. Avoid rehashing obvious legal principles; summarize the causes of action and discuss only legal issues that are in conflict or are novel. Include exhibits that truly clarify or explain a factual contention. Advise about prior settlement offers or demands. And then give the brief to the mediator several days before the mediation so that he/she has enough time to digest it and perform independent research into the applicable law.

An additional consideration is whether to send your brief to the opposing party. Some lawyers never do; others see no problem in sharing their thoughts. The issue is more a matter of personal style than substance if the lawyers truly want to settle their respective cases. Write two briefs if you want to mention legal and factual matters that only the mediator should know about; reserving for the one that shall be sent to the opposition facts, contentions and law that are known to both sides.

Prepare an opening statement or remarks. If there shall be a joint caucus (which can be confirmed by talking ahead of time with the mediator), prepare remarks for that session which address both the legal (such as the result of demurrers, motions to compel discovery or impending motions for summary judgment) and factual strengths of your case and why you shall prevail if the case is to be tried. Unlike at trial, these remarks can be argumentative. At the same time, avoid comments that will only inflame or alienate the opposing parties and their attorneys.

A well rehearsed client can participate in the preliminary remarks by answering questions posed by his/her attorney. In the appropriate situation and with the close supervision of the mediator, attorneys may be given the opportunity after their preliminary remarks to ask questions of their opponent regarding specific legal issues and facts.

Even if there shall not be a joint caucus, be prepared to make opening remarks to the mediator in the separate caucus that leave an indelible impression about the positive nature of your case.

Bring the entire file to the mediation. As at trial, attorneys should attend mediations with all of the pleadings, correspondence, discovery and exhibits in hard copy or accessible on a laptop, since it is often necessary to refer to a complaint or answer, deposition transcript or interrogatory response or photograph or letter to support or contradict an important proposition. If the needed writing or exhibit is not available, the lawyer must then ask a person at his/her office to fax or e-mail the writing. And, if the requested item cannot be found or forwarded, its effectiveness is lost with occasional negative consequences.

Bring settlement or closing documents. Although the neutral can provide an abbreviated settlement form, have a long form agreement available in hard copy or on a lap top or memory card. Because most parties want to memorialize all of the terms in a document, even when a

short form is enforceable, having the longer one at the settlement eliminates the inevitable hassling later on over its arcane language when the euphoria of the settlement has worn off.

Make certain that the settlement is enforceable. To be enforceable, all settlements achieved as a result of a mediation must include written language that waives mediation confidentiality. (See *Simmons v. Ghaderi* (2008) 44 Cal.4th 570.) The language, to be effective, should also refer to section 664.6 and say something like “It is the intent of the parties, pursuant to Evidence Code sections 1122(a)(1) and 1123(b) and Code of Civil Procedure section 664.6, that all of the terms of this agreement may be disclosed to a court of law and shall be enforceable and binding upon them in a court of law.”

Conclusion. Mediation, like a trial, is theater. The mediator and your opposition are both the audience and critics. Take all that you have worked on so carefully – your knowledge of the facts and law, the prepared client, the interesting exhibits and the tactical decisions - and weave them into a compelling presentation at the mediation. That approach will produce dividends. After all, mediations and trials are also alike in that preparation for both produces good results and a seat-of-the-pants attitude usually results in diminished returns.

Judge Michael D. Marcus (Ret.) is a mediator, arbitrator and discovery referee with ADR Services, Inc. in Los Angeles, where he specializes in the resolution of employment, personal injury, commercial, legal malpractice and real property cases. The *Los Angeles Daily Journal* recognized him in 2007 and 2009 as one of the top neutrals in California. Judge Marcus is a frequent speaker on mediation, arbitration, legal ethics and trial strategy for the Consumer Lawyers of Los Angeles, the Association of Southern California Defense Counsel, the CEB and numerous Los Angeles law firms. He received his B.A. from the University of California, Berkeley in 1964 and his J.D. from the UCLA School of Law in 1967.