Quarterly Review

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Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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Preparation, Peparation, Preparation
A Key to Successful Mediation of the Commercial Case

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Lack of appropriate preparation is the primary reason many mediations are doomed to fail before they even begin. Clients are not adequately prepared. The mediator is not properly prepared. The advocates are not prepared for the joint caucus sessions, nor are they properly prepared for the negotiations. The following are some practice pointers based on my twenty years of serving as a mediator and my most recent years limiting my practice to mediations.

PRE-MEDIATION MINDSET

Parties and their counsel in the commercial case come to mediation after months, and sometimes years, of contentious litigation where the attorneys expertly advocate their clients' positions and the clients, quite naturally, become firmly entrenched in their resolve. In their quest to prove the correctness of their position, clients overlook the fact that they have businesses to run, managers with quotas to meet and customers/clients with needs to be fulfilled. It is no surprise then that some attorneys come to the mediation as advocates, committed to argue forcefully that their side must prevail. Such an approach at mediation, especially in the commercial case, is counterproductive. It further emboldens the client, misdirects energies, and moves the parties further away from the objective of resolving the dispute, rather than moving the parties closer.

In order to have a successful mediation, the attorneys must first have an appropriate mindset. They must have a good faith objective of looking out for the client's business objectives. If the objective is to obtain free discovery, intimidate the opposition, or have the neutral bless the strength of the case, these goals may be achieved, but the dispute will not be resolved. The attorneys must first prepare themselves for the mediation and then the remaining preparation falls into place. Remember, preparation is the crucial ingredient for a successful mediation.

PREPARE THE CLIENT

First and foremost, the client must be prepared for mediation. The client has lived with the dispute. The client has a "let's win" mentality, if not a "we will bury them" approach. The client has experienced the events that gave rise to the dispute, and is thoroughly invested in the dispute. The client has participated in the strategy of maximizing the bargaining position and, ultimately, the strategy of winning. Then, all of a sudden, the client is thrust into this foreign arena talking about resolution, settlement and abandoning the battle.

It is crucial that the client fully understand what mediation is, and what it is not. The client must appreciate the process as well as the role of the mediator. Additionally, the attorney must make sure the client understands the concepts of confidentiality, self-determination and the client's control of the outcome. The client must be reminded that the ultimate goal is to achieve a result that is consistent with the client's business objectives.

If the client comes to the mediation and for the first time hears about the real weaknesses in the case from the opposing counsel, the mediator or the client's own attorney, it comes as a shock and, oftentimes, the client is reluctant to acknowledge such frailties in the case and the attendant reversal of momentum. It is surprising how many clients come to the mediation not fully aware of the facts, not fully aware of the applicable law and its impact on the case, and not otherwise aware of any inherent weaknesses in the case. This does not make for a successful mediation.

Not only does this result in the client being unprepared for the mediation, but it can cause the client to lose confidence in his or her attorney. In order to avoid such a consequence, the attorney must thoroughly prepare the client and candidly address (1) the client's business needs or interests above and beyond the specific claims asserted in the lawsuit (i.e., a favorable letter of reference, a continuing business relationship, a license or royalty

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agreement in an intellectual property case, etc.); (2) the strengths and weaknesses of the case; (3) the best and worst case alternatives if a settlement is not reached; (4) The risks, costs and consequences of not settling; (5) tough open-ended and searching questions that may be suggested by the other side or, more likely, posed by the mediator (who will occasionally play devil's advocate); (6) the tolls a trial can take on the parties, their relatives, their co-workers and their employees — the emotional toll, the physical toll and the financial toll; and (7) the probable/possible outcome of the trial or arbitration, including an appeal. Many of these are things the client may not want to hear — but hear them they must, to have a realistic view of the case and to have a successful mediation. Such a candid discussion prior to mediation fosters an appropriate mindset for a productive, effective mediation with no surprises.

Thorough preparation of the client may be more difficult than preparing the client for trial where the rules of evidence are designed to confine the areas of inquiry and the attorney has a greater ability to control the direction (i.e., "objection") of the discussion. In mediation, the mediator may ask the client tough open-ended and probing questions in order to get to the crux of the dispute. It is desirable for the client's attorney to cover all bases prior to the mediation and to be the one who manages the client's expectations, not the mediator or the opposing attorney. If the mediator or opposing attorney is in charge of managing the client's expectations, the client's confidence in his or her attorney is impacted, if not seriously eroded.

PREPARE THE MEDIATOR

Some practitioners may have a difficult time providing the mediator with practical, helpful information that can assist in bringing about a resolution of the commercial dispute. This is quite natural since most attorneys engaging in mediations are advocates — quite successful, effective advocates. As an advocate, it is the natural tendency to submit to the mediator a pre-hearing mediation statement that mirrors a finely tuned motion for summary judgment that informs the mediator (and the client) why the advocate's side will win and, of course, why the other side must definitely lose. While the basic information in the submission is important for the mediator to have (though it further emboldens and polarizes the client when he or she reads it), it is not enough information to educate the mediator for a successful mediation.

The mediation statement should go further. Of course, the parties should provide the mediator with all pleadings and substantive motions and briefs. Then, the mediation statement should cover (1) the facts underlying the dispute, (2) the applicable law, (3) the history of the dispute that cannot be gleaned from the pleadings, (4) the history of the parties' business relationship, (5) an explanation of the needs and interests of the client, (6) the perceived business needs and interests of the opposing party, (7) the history of settlement discussions, (8) stumbling blocks encountered in prior negotiations, (9) suggestions for settlement, (10) the attorneys' view of why settlement has not been reached, (11) the strengths and weaknesses of the case, and (12) whether a pre-mediation conference, jointly or separately, would be productive to promote discussion between the attorneys and their clients, and/or to provide a forum to put the issues on the table.

Mediation statements are generally provided to the mediator on a confidential basis; however, give thought to exchanging them with the other side. Or, one statement to the other side, and a confidential version to the mediator..

PREPARE FOR THE JOINT CAUCUS

One of the more controversial topics in mediations today is the joint caucus session where each side makes a presentation to the mediator and the opposing party or parties. In some areas of the country, joint caucus sessions have been abandoned. The stated justification is that they create harsh feelings among the litigants. They polarize the parties. They are counterproductive. And, "we already know the case." Of course, in some highly sensitive cases, they should be avoided — sexual harassment, certain family disputes, etc. But, by and large, they should not be abandoned in the commercial case. The joint caucus session is a great opportunity to make a thoughtful presentation to set the table for the ultimate resolution of the case and foster an atmosphere conducive to effecting a resolution of the dispute. This is especially true in the commercial case.

Some excellent advocates believe that the joint caucus is an opportunity to unload — to show the other side how brutal a trial will be — and scare the opposition into submission. This approach is akin to showing a 357 Magnum at the mediation table and then smile and say "Now, let's talk about an amicable resolution." Sometimes, this approach works, but more often than not, it further polarizes the parties and is the death knell for a continuing business relationship.

What works is a thoughtful, non-antagonistic presentation. The goal is not for the attorney to prove his or her case, but to convey the party's position directly to the decision-makers on the other side without opposing counsel filtering the message. Remember, a joint caucus session is one of the few opportunities an attorney has to speak directly to the opposing party. This opportunity should not be overlooked. Further, many times, the opposing attorneys have not prepared their clients and a look of surprise masks the client's face as the story is told by the opposition or conveyed by the mediator. It becomes obvious that the opposing client has never been told in a straight-forward, non-antagonistic way what the weaknesses are in his or her case and why it is to everyone's business advantage to resolve the dispute.

During the joint caucus session, the attorney should not simply rehash what is already known; rather, additional information that may not have yet surfaced should be provided. The attorney should candidly tell the decision-maker on the other side why his or her client wants to settle, and begin to create a foundation of credibility and sincerity. "While we feel comfortable about our case, we know we don't have a 100% chance of winning...." "It's too expensive to go to trial...." "We would rather devote our energies and resources to rebuilding a sound business relationship between our clients...." are some ice-breakers. Also, acknowledging obvious weaknesses in the case builds credibility with the mediator and the other side.

Finally, the joint caucus is an opportunity for the attorney or, preferably, the client to show sincerity and regret — an apology without admission — "we are sorry you feel the way you do" or "we are sorry the way things turned out " may set the appropriate tone.

PREPARE FOR NEGOTIATIONS

Discuss negotiation strategy with the client well before the mediation session. Remind the client to always keep the ultimate business goal in mind. Offers on the non-contentious issues should be made first, paving the way for the more contentious ones. When the negotiations reach the nitty-gritty nub of the dispute — money — the opening demand or opening offer should be realistic. Don't give the farm away, but be prepared to negotiate in good faith. Give some thought to what the reaction will be. Will the other side walk out? Will the other side counter with an equally ridiculous offer or demand? Will it polarize the negotiations? What offer or demand will prompt a meaningful response? Be prepared to work with the mediator. Have an opening offer or demand that reflects your belief in your case, but not so outlandish that it shuts the door to continuing realistic negotiations.

Discuss with the client the total financial costs of the case — attorney's fees, expert fees, litigation costs, etc. These cannot be ignored in formulating a negotiation strategy.

All that being said, it is generally recognized by the mediation gurus that a client or attorney will probably want to walk out of the mediation at least three times during the course of the session, each time claiming that the other side is not negotiating in good faith. That may be true on occasion, but that's also part of the process and the client must be prepared for it.

Discuss with the client beforehand how to react to a proposal from the other side. Plan how the client will react. Explain that extreme numbers, especially in the beginning, are (unfortunately) sometimes part of the process and standard operating procedure for some attorneys or their clients. Talk about business issues that could be introduced to sweeten the pot.

It is also helpful to invite the transactional attorney responsible for the client, or the client's business advisor, to participate in the mediation process to develop ideas and strategies for creative negotiations and to give advice on proposals.

Always, I repeat, always have the decision maker with authority in attendance at the mediation. The decision maker with authority means the one who has the authority and power, if not the inclination, to resolve the dispute. An absent decision maker, even if available by phone, sends the wrong message and puts the party's commitment to settle in question. Also, it interrupts the flow and synergy of the negotiation. At the end of the day, there is no substitute for showing up.

PREPARATION IS THE KEY

Preparation for mediation in a commercial case is all-encompassing. Just as counsel prepares for trial, counsel must prepare for mediation. While mediation is less formal than trial, preparation is critical and the benefits of a successful mediation can be measured in the client's pocketbook, the client's business performance and the client's appreciation of his or her attorney.

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Ron Isroff is the founder of Isroff Mediation Services, LLC in Cleveland, Ohio where he draws on his 45 years of legal experience representing both plaintiffs and defendants to effectively guide parties to make intelligent choices in resolving disputes in mediation. Ron is the former Chair of the Employment Law and Business Litigation Groups at Ulmer Berne, LLC in Cleveland. He has consistently been recognized by his peers as a "Leading Lawyer," an Ohio "Super Lawyer" and one of the "Best Lawyers in America." Ron retired from Ulmer Berne in 2013 to devote his full attention to alternative dispute resolution. Learn more at www.isroffmediation.com.