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Alternative Dispute Resolution

Back to the Future – Key Components for Preparing for a Successful Mediation

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Mediation is a part of almost every dispute, but are defense attorneys employing best practices to ensure the case is ready for mediation and ultimately resolution? Mediation is a process—not an event—and many practitioners have not changed their mediation approach to take advantage of new considerations and techniques. A successful mediation may not always result in settlement, but there could be other advantages making mediation a success. In order to allow for the best possible chance of success, practitioners should not only prepare cases for mediation by evaluating liability, damages, and expert considerations, but also should employ certain tactics before and during the mediation.

Key Considerations

Is the Case/Dispute Appropriate for Mediation?

Leaving aside the fact that most courts order mediation or settlement conferences, before going to mediation, it is important to determine if the case or dispute is ready. Mediation should not be something that is done simply to check a box or comply with a court order (or a contractual requirement) but should be pursued when the parties have enough information to appropriately evaluate the strengths and weakness of their positions, as well as the damages at issue.

When mediation is treated as an “event” and not a “process,” the parties may not consider mediation until after the close of discovery. However, considerations should be given to whether mediation can proceed early in the case – before discovery or after limited discovery (i.e., limited document exchange, or depositions of key witnesses). In many construction contracts, mediation is a condition precedent to arbitration, but the parties will not benefit from going to mediation if they do not have enough information to properly evaluate the case. The same is true in cases involving catastrophic injuries or employment disputes. Yet, it is often unnecessary to incur the cost of extensive discovery or document exchange to get to the key issues and evaluate the claims in dispute.

Also, before proceeding to mediation, the parties should consider whether expert evaluation is necessary. Do you need a technical expert? Do you need an expert to evaluate damages? Do you need an IME? If so, you should consider the implications of exchanging expert reports or opinions before the disclosure deadlines and make sure you provide sufficient time for expert evaluation before proceeding to mediation.

Who is the Right Mediator?

Attorneys often use mediators simply because they have used the mediator in the past with some level of success, but is he/she really the best mediator for your case and the goals you may have for the mediation? Before you can select the right mediator, you and your client need to understand the strengths and weaknesses of your case, as well as what you hope to achieve from the mediation. For example, if the goal to settle the claim in order to avoid risk either because the case involves bad facts, clear liability, or other business reason, it may not be necessary to retain a mediator who will study the mediation submissions, but can use his/her reputation to reach a settlement. This is often referred to as a “Facilitative” Mediation.

On the other hand, if you want to use the mediation as a way to get insight on the strengths and weakness of the arguments or an understanding of your adversary’s value (if the case does not settle), you should consider a mediator who is a subject-matter expert who will come to the mediation prepared as an unbiased third-party to offer insights on the positions advanced by all parties at the mediation. A mediator does not decide the outcome of the mediation but facilitates a discussion between the parties so that they can make an educated decision as to whether it makes sense to resolve the dispute. This is often referred to as an “Evaluative” Mediation.

How to Prepare for Mediation?

Preparing for mediation starts with a proper evaluation of the case. You cannot look at the case through “rose-colored glasses.” Instead, it is important to understand and evaluate your best position as well as the opposing position. This will allow you to anticipate the potential arguments that may be raised by the opposing side at mediation and also will allow you to set your client’s expectations. This evaluation includes legal arguments, identifying helpful and harmful evidence, and engaging expert witnesses as necessary. Careful consideration should also be given to potential impediments to resolution, such as liens held by workers’ compensation carriers, Medicare, and ERISA liens, as well as each side’s litigation costs.

If experts are involved, this is a good time to have candid conversations regarding the strengths and/or weaknesses of the other side’s expert opinions, as well as your own. Are

there facts or documents in the file that would support or refute their experts' findings? Oftentimes, expert opinions are based on assumptions and if flaws in those assumptions can be identified in advance of mediation it may widen the range of discussions among parties. Expert involvement in advance of mediation can also assist in clarifying key differences to prevent parties from relying on certain categories of differences without realizing the true magnitude and whether it is material from a damages standpoint.

Analyzing jury verdicts in your jurisdiction will not only help show the value of a particular injury or claim but also will show recent trends that you and your client need to be aware of to be adequately prepared.

A proper evaluation of the case will allow more meaningful discussion about the issues and value at the mediation, instead of having to spend time at the mediation trying to move one party off of an unrealistic expectation.

In addition, it is important to prepare a roadmap for your negotiations in advance of the mediation. You should discuss who will make the opening offer in negotiations and how you will respond based on the expectations derived from your case evaluation.

Should You Participate in a Pre-Mediation Conference?

In complex cases, it is recommended that you request a pre-mediation conference with the mediator. The conference can be used to explain your client's position and to answer any questions the mediator may have in advance of the mediation. The mediator may also use the pre-mediation conference as an opportunity to identify issues that you should consider and evaluate in advance of the mediation. You can also use the pre-mediation conference to identify impediments to resolution, such as an unprepared adversary, insufficient settlement authority, or an uncooperative client. This will allow the mediator to develop strategies in advance of the mediation to address these issues.

In construction and other complex cases, you should consider having pre-mediation exchange and presentations by expert witnesses. In most instances, it is difficult for the parties to appropriately evaluate their adversary's expert opinion quickly. Utilizing pre-mediation exchange of reports or expert presentations will allow the parties time to digest the information, have their own experts evaluate and respond, and be prepared to address at the scheduled mediation session.

What Should You Include in Your Mediation Brief and Should You Share?

Your mediation statement should outline your position in clear and concise terms, including citation to legal authorities and supporting evidence. To the extent known, you

should address the adversary's arguments—or at a minimum be prepared to address at the mediation.

The mediation statement should be used to educate the mediator by showing the strength of your position and why you believe you will prevail. In complex cases, you should include an itemization of damages and even share a spreadsheet with the mediator. The spreadsheet can include a short statement of your position on entitlement to the particular damage.

Because mediation is meant to be a process where both sides come to an agreement, you should strongly consider sharing your mediation statement with the other side in advance of the mediation. Again, this prevents a surprise that may thwart the purpose of the mediation at the outset of negotiations. Any information you want to keep confidential, such as a damage itemization, can be sent to the mediator separately and confidentially.

Who Should Participate at Mediation?

Participants at mediation may seem obvious: (1) Client; (2) Adjuster; and (3) Counsel. However, you should consider if your expert should participate (or be available) based on circumstances of the case and the expected negotiations. In complex cases with many moving parts, a qualified and experienced expert can assist in mediation to simplify complex issues for purposes of mediation discussions. Expert presence (in person or virtually) can also be helpful if new/different information is presented during the course of the mediation and when discussions regarding that information impacts the positions being advanced at mediation. Additionally, you may need someone other than your direct client contact at mediation if that person is not the ultimate decision maker. You also may want to include members of your support staff if you anticipate needing to locate additional documents or evidence as the mediation moves forward.

Should You Insist on In-Person or Virtual Mediation?

Since the Covid-19 Pandemic, almost all parties are familiar with virtual meeting platforms. Zoom and Teams are regularly used for mediation and can often cut down on expenses associated with mediation. Moreover, many some insurance companies no longer allow travel for mediation. Notwithstanding, one side or the other may insist on appearing in person. In that case, it is recommended that you proceed in person, using virtual capabilities to conference in any participant who does not need to be physically present.

Would an Opening Statement be Beneficial?

In recent years, parties and mediators have moved away from providing formal opening statements. It is often considered unnecessary in cases involving experienced business

parties and, likewise, avoids the risk of inflaming one party or an injured plaintiff. However, it may be useful to provide opening statements where one party wants his or her “day in court” or where you believe that opposing counsel may not have properly educated the opposing party about their risks. Again, it may be beneficial to have an expert witness make a short presentation.

Even if the parties and mediator agree that formal opening statements will not be provided, it is recommended that you outline your position so that you can address issues as they come up at mediation. You might consider preparing a PowerPoint presentation as if you were providing an opening statement so that you are able to quickly address any issues raised during negotiations.

What is Your Negotiation Strategy?

At mediation, it is important to remember the goals you outlined at the beginning of the process. If your goal is to reach a settlement, that will guide your negotiation strategy. If your goal is to potentially reach a settlement, while also learning about the other side’s case – or even to get an idea of how they value the case – you will take a different approach at mediation.

Keep in mind that no one wants to bid against themselves, so if there was an offer or demand made prior to mediation and no response was made, the response should be provided in the first exchange of numbers, along with a justification as to why you have offered that amount. Even if the parties are far apart at the start and it seems like there is no chance for settlement, it is recommended that you “trust the process” and see if you can bridge the gap. Resist using brackets too soon. Brackets may be helpful to get the dispute closer to resolution but often signal that the midline is the settlement amount, which could send the wrong impression.

In determining the amount of your offer, try to avoid increasing the amount of a current demand or lowering the amount of the last offer, unless there are supported reasons for the change in position. Just as parties will not want to bid against themselves, human nature will see a negative change in position as disrespectful, and it will resort in delaying the purpose of the mediation.

Make sure you also clearly delineate any contingencies or deal terms. For example, you should address confidentiality, non-disparagement, lien resolution, and other important terms at the outset and advise the mediator that all offers will be subject to the same terms. The mediator can then get an agreement on those terms to see if any of them are a deal-breaker from the start.

Also, if there are important coverage positions that need to be discussed, then make sure this is clearly and effectively communicated to the mediator and opposing counsel – even if you’re not the one making the argument. Obviously if you’re assigned defense counsel, you should not be the one making those arguments. However, you should nonetheless help facilitate that discussion between the mediator and your adjuster so that everyone is on the same page. If coverage is a legitimate impediment to resolving the case, then you should ensure coverage counsel attends the mediation to discuss the coverage position. As always, communication is key, and you’re not doing anyone a favor – including your client – by keeping the mediator and opposing counsel in the dark about the coverage issues that are going to have to be discussed at some point.

Finally, something to keep in mind for larger mediations – particularly when there are 10 or more parties – is that you may have limited face time with the mediator and opposing counsel – and even less time to communicate your defense. For this reason, it’s important to know exactly what your goal is, and to use the time that you’re given with the mediator as efficiently as possible in order to advance that goal.

Do You Document the Deal at the Conclusion of Mediation?

The mediator can confirm the terms of the settlement at the conclusion of the mediation, subject to a formal settlement agreement. However, to facilitate the settlement, you can prepare a Term Sheet or Settlement Agreement before or during the mediation, which can be executed once a deal is reached.

Conclusion

Because mediation is a process, not an event, it is important for attorneys to pay particular attention to the above considerations in order to achieve a successful result. Although a successful result may not be a settlement of the case, the mediation may be a success because you have been able to resolve some issues or gain information regarding your adversary’s case. The biggest impediment to a successful mediation is one side of the dispute not being adequately prepared or taking unrealistic positions. Utilizing the tips outlined above will ensure that you and your client are prepared for mediation even if the case is not fully resolved.

*This article was based on a presentation at the DRI Annual Meeting, which additionally featured panelists **Jennifer Engle** of JS Held and **Michael Ostler** of Allianz.*



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