Mediation Can Be Your Client's Best Alternative to Litigation

By Michael G. Nowakowski

When preparing to mediate a case, attorneys should consider three fundamental questions:

1. What can mediation do (or not do) for my client?

When used properly, mediation can produce a settlement controlled by the parties, save money, preserve long-term relationships, protect confidentiality, and resolve the conflict far earlier than other dispute resolution processes, including litigation. The goal in mediation is to reach an agreement acceptable to you and your client. The resolution is not necessarily the outcome that could be achieved through litigation. It is an outcome that should be satisfactory to your client based on all the circumstances. Mediation allows your client to avoid having a judge control the process of dispute resolution (e.g., scheduling orders, case evaluation, trial dates, and motion practice) and a judge or jury decide the facts in his or her case.

Mediation also provides an opportunity to save time and money and, in numerous cases, save face. It can produce a solution to a problem that not only settles the immediate case, but may also be crucial in maintaining future relationships. Does your client want to continue to do business with the opposing party? Will future dealings be necessary between the parties? A mediated settlement avoids the frustration of a win-lose outcome that is likely to end a relationship. Using a mediator early in the process may also prevent hardening of positions that could make resolution more difficult, expensive, and time consuming.

2. What is the best approach to mediation and who is the right mediator?

Attorneys should educate clients about the mediation process. The role of the mediator is to resolve the dispute. He or she is not an advocate for either party, but neutral with respect to the outcome of the dispute.[1] The mediator may perform a number of functions in the process, but it is the parties (with aid of counsel) who determine the ultimate settlement. Mediators are chosen for both process expertise (knowing the negotiation process) and subject-matter expertise (knowing the law and the industry). Which is more important in your particular case? Does the dispute involve complex terminology unique to your industry? In this case, it may be advisable to have a mediator who is an expert in the industry. This will eliminate the need for you to spend significant time educating the mediator. Is this dispute primarily the result of the parties' inability to negotiate a resolution because of personalities, attitudes, or political concerns? In this case, it may be more important to have a mediator who is an expert in the mediation process.

The style or approach of the mediator should also be considered. Do you prefer an evaluative approach, where the mediator may point out strengths and weaknesses of your case and that of your adversary? Or would a more facilitative approach—where the mediator assists in promoting discussion of the issues between the parties and respective counsel—be helpful? Alternative dispute resolution literature is filled with descriptions of these approaches, but in reality, most mediators may move within and between both approaches. Mediators typically are more facilitative at the beginning of mediation and become more evaluative as the mediation reaches its conclusion.[2]

Does your client need a dose of reality from the mediator—especially when you have not been successful in that effort? If this is the case, it is important that the attorney select a mediator who will carry weight with your client in administering that dose of reality. Careful selection of a mediator is critical with difficult or unrealistic clients. When selecting a mediator, you may use the State Court Administrative Office's approved court roster, or the parties may select a mediator by mutual agreement. The most important aspect in selecting a mediator is knowing the mediator's style, approach, and personality. It cannot be overemphasized that the mediator must have the temperament for resolving the issues in your case.

With very few exceptions, the mediation process is confidential.[3] Explain to your client that the mediator will expect a signed

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mediation agreement before proceeding, indicating the parties agree to confidentiality and will not require the mediator to testify in any future proceeding, either voluntarily or through subpoena. Confidentiality makes the process work. The mediator will conduct joint sessions with all parties and counsel in the same room together, but will likely also use a caucus approach where the mediator meets with each side in separate rooms. Whatever the mediator is told remains confidential unless there is an agreement to convey information to the opposing party. Clients should expect to be asked questions by the mediator and to provide the mediator with information needed to resolve the dispute. For the mediation to be successful, it is important to trust the mediator and the process.

3. How can we most effectively use the mediator?

To begin, be sure you and your client understand that your strategy and advocacy in the mediation process are not designed to convince the mediator of the validity of your case. The mediator does not need to be convinced—it is the opposing side that needs to change its position if an agreement is to be reached. The mediator's sole task is getting the parties to agree to a resolution.

The mediator is not concerned with who is right or wrong. In an evaluative approach, the mediator attempts to create doubt on each side so that both parties can reevaluate their positions and consider compromise or alternative proposals. Preparation and flexibility are essential. It may be helpful to consider each side's best and worst alternatives to a negotiated agreement; e.g., what happens if we do not resolve this dispute? There is a tendency to overestimate your best alternative while underestimating your worst. Similarly, we tend to underestimate the other party's best alternative and overestimate their worst.

The mediator will also probe to discern the underlying interests of the parties to the dispute. What does your client really need? Are there potential solutions that cannot be achieved through litigation? The mediator can help develop options a court cannot provide. Agreements are almost limitless in alternatives ranging from a simple apology to addressing long-term relationships, which may be economic or noneconomic. It may be that the conflict cannot be resolved by litigation, but the parties may find it easier to determine jointly how they would like to proceed in the future—whether on a business or personal basis. The mediator is likely to ask a number of questions to determine if a creative resolution is possible. You and your client should be prepared to share needs, feelings, goals, and aspirations with the mediator.

A mediator may be of great assistance in exploring options through the use of a "supposal" by asking each side, "Suppose the other party could agree to the following. Would it be acceptable to you? If not, what might you be able to do under those circumstances?" This allows the mediator to assess if there is a potential agreement in the future by recognizing an overlap of interests, often referred to as a zone of possible agreement.[4] With this approach, the mediator can test the water with each side while not jeopardizing one's official table position, thus limiting the risks of actually making a proposal.

Lastly, it is important to keep in mind that the mediator is not the enemy, but another tool to resolve the dispute and meet your client's needs. A good mediator may challenge the parties to become problem solvers rather than just advocates. Some cases require a final verdict or judgment, but most do not. Statistics are abundant showing that most cases do not result in a complete trial and are likely to be settled. Mediation can be effective in saving money for your client and alleviating the aggravation of a long, drawn-out trial. It can also produce an outcome that is certain and acceptable to both parties. Mediation can result in a resolution that the parties can live with.[5] Thus, mediation can be your client's best alternative to litigation. ■

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The views expressed in this article are those of the author and do not purport to be an official position of the Federal Mediation & Conciliation Service.

ENDNOTES

1. See State Court Administrative Office, *Mediator Standards of Conduct*, effective February 1, 2013, available at <http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf> (accessed December 17, 2013).
2. See generally Riskin & Westbrook, Dispute Resolution and Lawyers (4th ed).
3. MCR 2.412(C).
4. See Fisher & Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1991).
5. See Stark, *Making the most of mediation: 10 top tips for maximizing results in the process*, 21 SBM ADR Quarterly J 1 (September 2013), available at <http://www.michbar.org/adr/pdfs/sept13.pdf> (accessed December 17, 2013).