MAXIMIZE YOUR MEDIATION

By Amy Lieberman

I'm sure every lawyer reading this has either served as a mediator, or represented a party in mediation – many times over. Every lawyer (hopefully) meets with their client to prepare them for the mediation. They talk "strategy" – how much are we willing to offer? What will be our "bottom line"? How much should we tell the mediator? Who's going to do the talking?

Most of the mediations I handle are employment mediations – some with represented parties, some where only one side is represented, some where no lawyers are involved. Some are at the "claim" stage, such as the EEOC, and others are in the midst of full-blown litigation. The rest of the mediations involve commercial issues – breach of contract, real estate disputes, securities matters – and some are general civil disputes, as a Judge Pro Tem.

The subject matter may vary, but there are some key lessons I've learned from several years of full-time practice as a mediator, that may be helpful to you and your clients.

BEFORE THE MEDIATION:

Know your client's goals – and needs. It is amazing how many times a settlement may turn on issues that have nothing to do with how a lawyer has evaluated the value of a case, from a legal perspective. The amount of an unrelated debt may be foremost in the client's mind. The need for an acknowledgement (a close relation to an apology) that a situation giving rise to the dispute was not handled as well as it could have been may be more critical to the plaintiff's peace of mind than the dollar amount of the settlement. A current or prospective employment relationship or business deal may hinge on the outcome of the mediation, affecting your client's willingness to compromise. If you explore such things ahead of time, the mediation will be more effective. A recent mediation of mine resolved for a modest payment, along with a sincere apology for the things that had escalated to the litigation level, the plaintiff said, "You have no idea how much that (the apology) means to me. It means more than the money." And she meant it.

Alert the mediator to any special concerns – ahead of time. If you evaluate the case differently than your client, let the mediator know that you could use some assistance in setting reasonable expectations. If you do not feel the parties can be in the same room, even briefly, call the mediator ahead of time. If there will be limitations on authority, or someone critical cannot be present, let the mediator know.

Anticipate the need for flexibility. Parties usually come to mediation with a pre-planned "bottom line". However, in my experience, in virtually every mediation the participants learn something they *did not know* before. It could be a document or an email; it could be a conversation they had not known of; it may be as simple as learning that someone's intentions or motivations were not as they had previously assumed. It may be that the mediator doesn't see the case as obviously in their favor as they anticipated. It is often that discovery or realization which opens the door to resolution, when that door was blocked before. Alert your client to this possibility ahead of time, so that your client is not so wedded to a pre-planned bottom line that he or she can't move, even in the face of new information.

DURING THE MEDIATION:

Don't start out higher than your last demand – without advance notice. Mediation can occur many months after demands and offers have been exchanged. Sometimes, litigation has continued, and attorney's fees have increased. It is not unreasonable in such a case for a demand to increase. Be sure to alert your opponent if you intend to increase your demand *sufficiently in advance of the mediation*. Otherwise, one of two things will occur: your opponent will accuse you of "bad faith" (it's not, but that doesn't mean they won't go there), threaten to walk out, or start their responsive offer at a much lower place than they had planned. Most people want to be prepared, and they will prepare their client based on where they anticipate you are coming from. It is frustrating to be faced with an unexpectedly increased demand, because they will not have considered or evaluated it ahead of time, and likely will not have received sufficient authority to respond. Starting out higher, without advance notice, increases hostility and positional bargaining, and often reduces your chances of resolving the matter – at least on the day of the mediation.

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Trust the mediator – and the process. Hopefully you have worked with that mediator before, or checked out their process. Not all mediators work the same way. If you have done your homework on the mediator, and the mediator has a decent success rate and builds a comfortable rapport with the parties, it's okay to relinquish some control over the negotiations to the mediator. Ultimately, it is in your client's interest to tell the mediator where you'd like to end up, so he or she can help discover whether that's possible and get you there. If you keep things too "close to the vest", you may be hampering the mediator's ability to assist you.

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Make sure your client has the opportunity to speak. Every client wants to have his or her "day in court". If they have not yet been deposed or given a statement to an investigator, they will still have the need to be heard, and to have their beliefs and concerns validated, or even challenged. This can be done in joint or separate session. In one commercial mediation I handled, the lawyer left the room very early on during a separate session and negotiated a resolution with the other lawyer that met the client's "bottom line" – without the clients' knowledge or consent. It was a good outcome, but it took the clients over an hour to get comfortable with it. They still wanted to complete the process, to finish telling their views, to test their theories and ideas, have them validated or challenged – just be *heard*. They said to their lawyer, "But we weren't done…how do we know we couldn't have done better?"

Be aware of ethical issues that may arise. There's a difference between not disclosing strategy, and not disclosing critical facts that, if known, may have prevented a party from agreeing to a settlement. Be aware if there may be risk of non-disclosure which may result in the undoing of an agreement based on misrepresentation.

AFTER THE MEDIATION:

Keep the door open – at least for a short time. The majority of cases that are mediated will resolve during the mediation. No matter which agency or mediator is keeping statistics, success rates are over 50% and in some cases, closer to 85% or 90%. If your case does not resolve at the mediation, consider keeping the last offer or demand open, at least for a short period of time. Your client may have a change of heart after sleeping on the matter. Keep the option open for a second session, after a bit more discovery. Remember, the parties came to the mediation voluntarily – they *want* to resolve their case. An impasse that seems insurmountable may be overcome, sometimes just with the passage of time.

Amy Lieberman is the Executive Director of Insight Employment Mediation, and is a full-time mediator and arbitrator of employment, commercial and general civil disputes. She has been recognized as an "Advanced Practitioner" in Workplace Mediation, by the national Association for Conflict Resolution. She is the recent past Chair of the State Bar ADR section. She also teaches a 40-hour training program, "Fundamentals of Civil and Workplace Mediation." For more information, contact Amy at amy@insightemployment.com, 602/404-6544.

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