Judicial Opinion

Let's Prepare for Success Where Our Cases Actually Resolve

By Hon. J. Richard Haden (Ret.)

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Most of us spend a great deal of time preparing and training for jury trial. Each year there are an endless array of excellent MCLE programs on jury selection, opening statements, cross examination, and argument. After all, as trial lawyers we need to hone our skills. However, more than ninety-five percent of civil cases never come close to a trial. They are resolved in a court-sponsored settlement conference, or some form of mediation or arbitration. Compared to trial training, there's very little MCLE available for Alternative Dispute Resolution (ADR). It's as if our military concentrated all its attention on the unthinkable nuclear option while ignoring conventional and counterinsurgency warfare. Solid trial preparation often provides the leverage for a good settlement. *See, e.g.*, CEB's "A Litigator's Guide to Effective Use of ADR in California." Therefore, I'm not suggesting we ought to abandon trial training, but I do believe we ought to give a bit more thought to preparing to succeed for our clients where more than ninety-five percent of their cases resolve.

As a trial judge for twenty-one years and a private mediator nearly two, it has been my privilege to work with counsel on cases in jury and court trials and all manner of ADR. It is my experience there are some big differences in how lawyers ought to get ready for each. I'd like to offer some suggestions on how to prepare to succeed in mediation both through sound advance planning and compelling presentation during the mediation itself.

Advance Planning for Mediation

When to Mediate. While there is never a bad time for mediation, some times are better than others. Early mediation means fewer costs need to be recovered as part of the settlement but may also mean the case has not developed sufficiently for one side or the other to make an informed decision. Corporate clients and insurance companies simply won't agree to substantial awards until they've worked up the file. Mediation on the eve of trial means everybody knows the case but often presents a case loaded with expert and discovery costs compounded by entrenched positions and heightened emotions. While a skilled mediator can probably settle a case any time, it's best not to jump in until you know your case but before you've blown the budget.

Who to Pick as a Mediator. There are many outstanding mediators and most are not shy about their qualifications, with résumés which are readily available on the internet. While résumés are certainly a start, it's a good idea to talk with a colleague who has utilized the mediator in the past. Some lawyers and clients value technical expertise and seek, for example, the "left handed tuba player" or "Albanian soap expert" as their mediator. Some lawyers and clients seek the experienced evaluator who will just "give us a number." Some seek a mediator whose style will fit best with a particular client. Should the mediator pound the table, project empathy, or

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just roll up his or her sleeves and listen? Early evaluations can be unhelpful because the mediator may not know enough about the case at that point to make an accurate call. Moreover, the right number at the wrong time may become the wrong number. Often one party or both need to work through the process before agreeing to a number that may have seemed obvious to those not personally embroiled in the case. My view is a "facilitative" mediator skilled in the process of bringing the parties together can likely settle anything and those mediator's proposals some attorneys seek at the start of mediation are best left for late in the day, if at all.

How to Prepare Your Client for Mediation. It's always a good start to sit down with and carefully listen to your client. I'm continually amazed when clients share things during mediation that surprise their lawyers. Next, there's a need for the client to listen to you. You need to decide together where you'd like to begin in mediation based on where you need to end up. Perhaps you both need to give some thought to what the other side needs to accomplish as well.

Clients need to arrive at mediation with an understanding of the process, respect for the mediator, confidence in their counsel, and reasonable expectations about the case. Most clients don't do this every day and need a basic explanation of how mediation works. They ought to be ready to hear the weak points in their case and they need to understand your strategy. It sure helps the mediator if counsel builds him or her up a bit with the clients. After all, you made the selection.

Clients also need to understand the likely cost of trial which includes not only the trial budget but also the consequences of an unfavorable verdict and the costs and time involved in any side's appeal. With mediation, the client may not "ring the bell" with the greatest possible award, but may instead maintain control of the decision and achieve an award that works.

The Mediation Brief. The mediation brief is important because it helps each side succinctly state its position and goals, prepares the mediator in advance, and — if exchanged — alerts the opposing side to the views of the other. When drafting any legal document, counsel ought to begin by noting who the audience or recipient will be. In a trial brief, for example, it's the judge. In mediation, however, it's the other side, because the mediator won't be "deciding" the case. That's why it's a good idea to exchange briefs with the other side. If there is truly "confidential" material for the mediator's eyes only, that can be shared in a separate document. It is also important to get the brief to the other side in ample time for decision makers to review it. Corporations and insurance companies may need time for review by a variety of teams, committees, or boards before making a decision.

A Compelling Mediation Presentation

Project Confidence. A compelling mediation presentation begins with the ability to demonstrate you believe in your case and are fully capable of trying it if you are unable to achieve a satisfactory resolution. If, for example, the mediation is near the trial date, you ought not to have missed expert designation dates and have a big list of depositions pending. If you have prepared charts, videos, and enlarged photos that the other side will soon see anyway, why not bring them to the mediation? Projecting confidence gets you and your case off to a great start and may set the tone of the entire mediation.

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Get the Decision Makers to Attend. Usually individual plaintiffs attend mediation. It's more of a challenge to get corporate or insurance

representatives in authority to participate since the boss is busy and may plan to send an underling with limited decision making ability. This is a real impediment to mediation success because there is just no substitute for personal contact with both the opposition and mediator. A sense of urgency is lost when the person you're trying to convince is on a cell phone in commuter traffic in New Jersey, not looking you in the eye across the table. When sides make every effort to get the key players to attend, they enhance the prospects for mediation success.

Remember Who You're Trying to Persuade. As lawyers we're accustomed to arguing to the court, so we're naturally inclined to direct our arguments to the mediator. While it certainly doesn't hurt to convince the mediator of the sincerity and soundness of your position, the mediator is not the one making the decision. Arguments need to be made to the other side. Take time to consider who you need to convince and tailor your arguments accordingly.

The Joint Session. "Classic" mediation involves the parties directly communicating face-to-face with one another. However, mediation today may or may not include a joint session. In a joint session everyone gathers together with the mediator for introductory remarks by the mediator and a summary of the positions of each side by counsel or the parties. Some mediators insist on these sessions while others would never allow them. I've had many lawyers ask me to skip this, given I've read the briefs and they'd like to "get started." I think joint sessions can be helpful in certain cases, perhaps harmful in others, and I usually defer to counsel. If the parties personally despise one another, that animosity may become counter productive. If the parties can tolerate one another, hearing directly from each other may be extremely helpful. You should decide whether you want a joint session before you arrive so you don't get pushed into something or miss out on something you think would be worthwhile.

Maintain a Relationship with Opposing Counsel. Sadly, too much trial preparation today devolves into vitriolic confirming letters, unnecessarily voluminous interrogatories, and "Rambo depositions." This conflict can engender a poor working - relationship between opposing counsel which is tragic not only because it hinders counsel's ability to represent the client and achieve a positive settlement but also because it's just bad for professionalism in the bar. We need to remember that ours is the profession of John Marshall and Abraham Lincoln and act accordingly.

Break-Out Sessions. Here's a chance to take advantage of the mediator's skill. After your client has had a full opportunity to speak, let the mediator talk about risks of trial and, if possible, reinforce some of the points you've previously made with your client.

Be as Candid as You Can Be With the Mediator. Don't hold back settlement conditions from the mediator until late in the day. A seemingly small point sprung on the mediator and the other side at the last minute can become a deal breaker. If kept informed, the mediator can help determine when those points ought best to be raised.

Do Not Get Discouraged. Sometimes progress in mediation is maddeningly slow and it may seem the other side just doesn't get it. Hang in. Often all it takes is a little time to let it all sink in. Maybe someone needs to sleep on it or talk it over with a spouse. Maybe another corporate decision maker needs to get in the loop. The best mediators realize this and simply never give up, even long after the session ends. Many mediations are successfully concluded only after the initial meeting and many require multiple sessions.

Get it in Writing. Once you've agreed on the settlement terms, get at least the bullet points down in writing and have the parties and counsel sign. Everyone should leave with a copy. Oral agreements not on the record are probably unenforceable and memories may differ weeks later. You do not have a settlement until it's in a signed writing or on the record.

Since the overwhelming majority of our cases resolve in ADR, we ought to take that process as seriously as we do preparation for trial. We can succeed in mediation through sound advance planning and compelling presentation during the mediation itself.