THE ATLANTA LAWYER

ATLANTABAR.ORG | THE OFFICIAL PUBLICATION OF THE ATLANTA BAR ASSOCIATION | AUGUST/SEPTEMBER 2023

THE ALTERNATIVE DISPUTE RESOLUTION ISSUE

ADVICE FROM MEDIATORS, JUDGES, AND ADVOCATES

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ON THE COVER: This issue's ADR contributors include Gregory J. Parent, Hon. Randy Rich, David Root, Joyce B. Klemmer, Andrew B. Flake, and Caitlin Livingston

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Mediation: Effective Preparation and Communication

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When discussions have failed to resolve a threatened or pending case, mediation may lead to a settlement. In the mediation process, the parties meet with a mutually selected, experienced mediator who assists the parties in negotiating a resolution acceptable to all parties.

Clients expect their lawyers to negotiate for them, but not all litigators are experienced negotiators. So if you are a litigator, how do you prepare for a mediation? Many litigators come prepared to argue the merits of their client's claims or defenses. If their plan is to convince the other side that they are right, that plan will probably fail. Preparing for mediation requires a thorough evaluation of the strengths and weaknesses of the case, the client's needs, and - most overlooked - the needs and wants of the opposing party.

I. Preparing to Mediate

Timing Is Everything - Choose the Right Time to Mediate

In deciding whether a case is ready for mediation, it is important to consider the stage of the dispute. Is the dispute at the demand stage or is it already in litigation? Most mediators recommend

that the parties use mediation at an early stage, before positions have solidified and substantial expenditures have been incurred. However, most litigators do not want to go to mediation until they are comfortable that they have sufficient facts to evaluate the merits and value of the case. Not unexpectedly, both sides tend to be more reasonable when faced with impending litigation or litigation deadlines.

Handle Expectations by Setting the Ground Rules of the Mediation

After a mediation is scheduled, the mediator will typically schedule a joint conference with counsel and provide an agenda of the matters to be discussed. I hold most of my pre-session conferences via Zoom because my purpose at the initial conference is to get acquainted with counsel, see how they interact with each other, begin to establish trust and build rapport, and to get counsels' commitment to the process. Aside from logistical matters - such as date, time and length of the mediation - some of the more important matters to be discussed are who will attend the mediation, confidentiality, whether pre-mediation exchanges of information are needed and whether there will be opening presentations.

Individual Party Conferences

Once the initial pre-mediation conference has been held, individual party follow-up conferences with counsel are scheduled. These follow-up conferences are usually scheduled for a time after the mediator has read the parties' mediation statements and reviewed any other documents submitted by the parties. The individual conferences give the mediator the opportunity to ask questions about the case, the parties, and impediments to settlement and they give counsel an opportunity to engage in a candid, private conversation with the mediator.

If counsel and clients are willing, there are significant advantages to scheduling another conference between the mediator, the party representative and that party's counsel. Getting the client involved before the mediation session itself encourages them to think about possible resolutions and also gives the mediator an opportunity to build rapport and gain valuable insight into issues, possible resolutions, and personality dynamics that might come into play during the mediation.

Getting Client 'Buy-In'

Nothing will doom settlement negotiations in mediation faster than lack of preparation. Preparation includes ensuring that the client agrees with the lawyer's assessment of the case and acceptable settlement terms. These matters should not just be discussed with in-house counsel. Instead, counsel should suggest a joint meeting with the business people to brainstorm about different ways the matter could be resolved and acceptable settlement terms.

This is also a good time to deal with unrealistic expectations. For example, if the client has been reading the briefs and has formed the belief that attorney's fees are routinely awarded, their expectations of a litigated outcome may be unrealistic.

The Parties - Who to Bring to the Mediation

Lawyers have great influence over who attends the mediation. Sometimes the person who knows the most about the facts of the dispute is not the best person to attend the mediation. Sometimes a business person with little knowledge of the facts, but who is attuned to the needs of the business, can be far more valuable at the mediation than a person with full knowledge of the facts who may have a personal or professional stake in the outcome. Often an in-house counsel is required to attend the mediation, but would welcome being accompanied by a corporate representative whose judgment and negotiating skills are respected within the company.

II. Effective Communication

The Mediation Statement

Before you draft a mediation statement, you need to understand the problem and the possible solutions. These are issues that need to be discussed with the client long before the mediation session.

Define the Problem

At the outset, defining the problem may seem easy - the other side breached the contract, infringed intellectual property rights, was negligent, etc. However, those are conclusions, not the problem. The problem is the harm that the event is causing or will cause in the future. For example, in a breach of contract case, the "problem" is not the breach, the problem may be unrealized financial gain, increased costs, loss of future business, loss of reputation in the marketplace or the effect of the event on the value of the business. Define the problem in terms of what both parties need to resolve the dispute.

In defining the problem, start with what you know and determine what information you do not know. If your party does not have the information, but the other side does, ask the mediator to facilitate an informal exchange of that information before the mediation session.

Consider Possible Solutions

Having defined the problem(s) in terms of both parties' needs, you are ready to consider possible solutions. Meet with people who are both effected by the problem and are in a position to contribute possible solutions. In a business dispute, that group may include managers, sales people, product engineers, accountants, or public relations people in addition to the business decision makers. Encourage creativity because an idea that may seem ridiculous might turn out to be possible, or it might be modified by other members of the group and end up being a viable solution to the problem.

There is nothing wrong with asking the mediator to "feel out" the other side about whether they would or would not consider a proposed term of the settlement. Knowing in advance what a party may be willing to do to resolve the case is very valuable information to an experienced negotiator.

Use the Mediation Statement Requirement to Your Advantage

Mediators usually ask the parties to provide a mediation statement in advance of the mediation and outline the topics to be addressed. A mediation statement can be given solely to the mediator for the

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mediator's use (confidential) or it can be given to the mediator and to the other party (non-confidential).

The advantage of a non-confidential mediation statement is that it gives you the opportunity to communicate directly with the principles on the other side and propose alternative solutions. In turn, this gives them time to consider the proposal in advance, discuss it with others and get answers to any questions they may have before the mediation session.

It is also possible to draft a mediation statement in two parts – a non-confidential mediation statement to be shared with the other side and a confidential appendix to be read only by the mediator which candidly discusses strengths and weaknesses and other factors that could impact the negotiations.

Opening Statements/Presentations – An Opportunity to Educate

On the question of whether there will be opening statements, opinions differ about their value. Some lawyers believe that having opening statements at the mediation will be unproductive, may polarize positions, and will only give opposing counsel an opportunity to posture. Requesting the mediator set and enforce agreed upon ground rules will minimize those risks. At a minimum, each party needs to agree that:

1) each party will respectfully listen to the other party without interruption;
2) opening statements will be non-argumentative; and
3) subject to agreed-upon time limits.

Making an opening statement is an opportunity to educate, persuade, open a dialogue, create trust, and encourage compromise. It may be your only opportunity to speak directly with the decision makers before the parties go to their separate caucus rooms. Instead of leaving it to the mediator to tell the other side what you need to settle - tell them yourself. A non-argumentative presentation of the facts, law and possible resolutions that is coupled with logic and reason can convey a genuine interest in resolving the case and open a dialogue about what the clients need to settle the case. Speaking with conviction about the merits of your case, highlighting any facts or law that the parties agree about, recognizing the other side has needs, and acknowledging areas of uncertainty in your case will give you credibility with the mediator, opposing counsel, and most importantly, the people who have authority to settle the case.

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