Winning Your Case Without Going to Court

Successful Mediation Techniques

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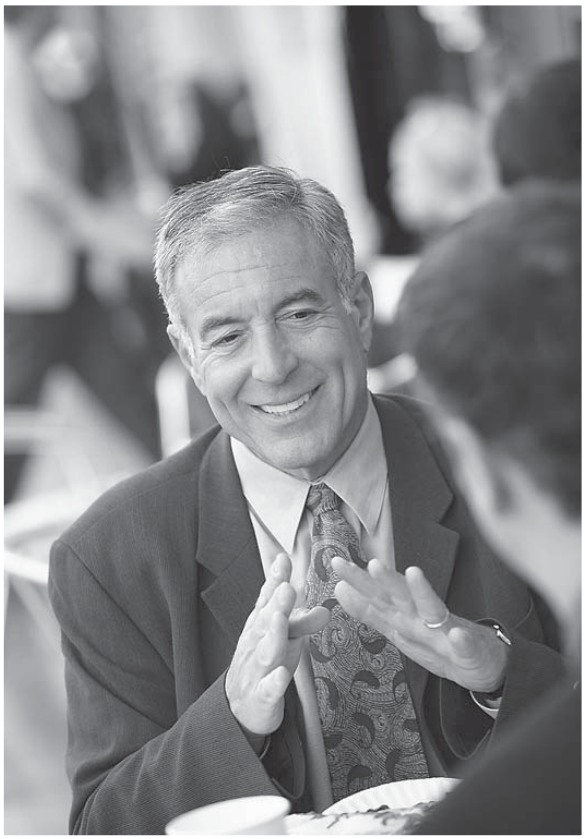
In an environment where fewer than 5 percent of litigated cases get to trial, attorneys are well served to hone their mediation skills to achieve best results for their clients. From the point of view of a retired judge and a former litigator, the differences between mediation and court are quite apparent.



Introducing the New "Ante-Court house"

The biggest difference in private mediation from the court setting is the luxury of time. Sitting judges, especially in light of the current budget and staffing concerns, simply don't have the time that a private mediator does to "stick with the case" until it is fully and finally resolved.

Another difference is the lack of formality of private mediation. While the courtroom or chambers setting brings the solemnity and power of the court to bear, the typical ADR office allows the parties to access the Internet, prepare and print settlement documents and even snack on freshly baked cookies when the tension rises!

Many cases go to a court settlement conference because they are ordered to do so. Conversely, participants in private mediation are there because they want to be. The timing of the mediation hearing is often critical to its success or failure. It should be the subject of thoughtful consideration in every case. "Seize the day" and take advantage of the opportunity to schedule the mediation when it is most logical and beneficial for the case: before filing, immediately upon completion of preliminary discovery or while a critical motion is pending or has been denied and the parties are facing the certainty of a lengthy, expensive and high risk trial.

Failing to prepare is to prepare to fail

The great UCLA basketball coach John Wooden said, "Failing to prepare is to prepare to fail." That observation applies to mediation as well. A timely submitted brief is always the best practice. It will not only serve to inform the mediator of the critical facts and legal issues, but will also focus your argument, evidence, evaluation of damages and legal issues for you and your client. In most instances, briefs should be exchanged between counsel in advance of the hearing, too. When you serve the brief on your opposition, you prepare them for your ultimate objective: to settle the case in a single day. Use your brief to explain why you feel the opposing party's position is not well taken and give your opponent the chance to consider the merits of your position, while perhaps reevaluating his own.

In preparing your client for the mediation, explain that the mediator does not have the authority to order resolution, but will attempt to build consensus for a mutually acceptable settlement. You should review the qualifications and biography of the mediator and explain why he or she was chosen for this case, building your client's confidence in the process.

Remind your client that no one "wins" a mediation; there must be compromise by each side. Work with your client in advance to determine what the range of possible outcomes may be, recognizing that it will not be either the potential highs or disappointing lows of a trial verdict or judgment. Mediators call this "managing expectations".

Contact opposing counsel and informally explore the possibility of resolution before the mediation. Get a sense

of what the issues of major contention are going to be. Counsel should come to the mediation only after having exchanged thoughts of an initial offer. If you aren't ready to do that, you and your client are probably not ready for a meaningful mediation hearing either. Dealing with these and similar issues before the mediation allows focus in both your preparation and presentation at the mediation itself.

Inform your opposing counsel of your preliminary thoughts on liability and damages in advance, and advise counsel what more he or she needs in order to fully evaluate the claim in advance of the mediation. There's no need in modern litigation to wait until the Court compels you to "meet and confer" to work cooperatively with your opposition in an effort to settle your client's case. Since it's inevitable that you will be asked to do so eventually, why not be proactive and begin the dialogue well in advance of the initial hearing on mediation?

Also, it can be enormously damaging to extend an offer beyond your settlement authority, and then have to correct it; this dilemma can be avoided by confirming with certainty what the settlement authority is before committing to any settlement offers.

One really significant difference between court and private mediation is the availability of ex parte communication. If there are cultural or issues of personality between the parties or counsel, a "heads-up" to the mediator is very helpful. Before the mediation consider what the most likely avenues of resolution are, and share your candid thoughts and concerns with the mediator. For example, if it is clear that there is a certain challenging dynamic between counsel or the parties, the mediator can take care to keep them in separate rooms throughout the hearing. If, on the other hand, counsel have tried past cases against one another and have a high degree of respect for one another the mediator can bring counsel together, outside the presence of their clients, for a more collaborative meeting during the hearing. If there is a highly emotional party involved, the mediator can also take pains to pay extra attention to listening to their story (we call this "empathic listening") in order to provide them the opportunity to be fully heard.

Meaningful participation at the mediation is the key

Candidly discuss the strengths and weaknesses of both your case and your opponent's case with the mediator. Here is where you will want to hold private discussions with your mediator, sometimes even outside the presence of your client. Oftentimes, the relationship with your own client makes it difficult for the advocate to tell the client the shortcomings or downside of his/her case. Mediators refer to this analysis as the "BATNA" (Best Alternative to a Negotiated Agreement) and the "WATNA" (Worst Alternative to a Negotiated Agreement). If you've hired a mediator whom you respect, listen to their reactions carefully and invite them to provide their reactions to your client and your case for the benefit of your analysis of the offers and demands as they are exchanged.

The mediator can cautiously but directly deliver the message to the client that the attorney is having a difficult time delivering. There is nothing like a war story from a judge who has shaken his or her head at a verdict or a "horror story" of a case that failed to settle, went on to trial, and got a result enormously different than the one available at the time of mediation to re-focus the discussion on settlement.

It is essential to remain open and flexible at the mediation, so all parties and counsel can thoughtfully consider not only the position they are espousing, but the position of other parties and the insights, observations and suggestions of the mediator as well.

Counsel should bear in mind that the level of advocacy at the mediation

is not the same as in trial; at mediation the gladiator suit can be left at the office and the comfortable visage of reason and compromise donned in its place. It is typically a more casual environment. No ties required.

Another benefit of private mediation is the possibility of ongoing involvement by the mediator in supervising the terms of the agreement or clarifying issues of compliance as they arise.

Never give up

Not all mediations are successful. At least not the first time. We all know that well over 95 percent of all cases filed in the Superior Court are resolved short of verdict. The important thing to remember when mediation is not initially successful is that it is a process, and perhaps you have just taken the first step.

Never give up. Careful preparation, thoughtful timing, a positive attitude and perseverance pay off in mediation.

Counsel should also keep the mediator engaged in settlement discussion by email or telephone. Let the mediator know what is going on, what has changed, and what your position is currently on settlement. And be sure to be clear about what is privileged and what you are willing to share with the other side.

Conclusion

Mediation and settlement conferences are now not only a staple of litigation, but resolve many, many more cases than trial. Maximize your potential resolution by thoughtfully choosing your forum, the timing of your hearing and a skillful professional mediator. Then address the critical issues, prepare for your hearing with care, diligence and purpose, communicate with your client, opposition and the mediator before, during and even following the mediation and remain open and flexible with a goal of achieving a winning resolution of every case. You may find that going to work without a necktie and enjoying warm cookies in the afternoon may suit you and your clients better than the courthouse ever did!

Judge Joe Hilberman served on the Los Angeles Superior Court from 2002 through 2009 following a 27-year career in civil litigation. He currently serves as President of the UCLA School of Law Alumni Association. Judge Hilberman was recognized by the Los Angeles Chapter of ABOTA as Jurist of the Year in 2008 and by the Los Angeles Daily Journal as one of the "10 Best" new mediators in California in 2009. Judge Hilberman is currently a full time mediator, arbitrator and discovery referee with ADR Services, Inc.

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