STEVE BLOCK, ESQ.

Mediation Reduces the Cost of Litigation.
But How Do You Reduce the Cost of Mediation?
By Steve Block, Esq.

Mediation vs. Litigation

There isn't much debate over the fact that the resolution of a case can and does reduce the cost that would result from litigation. Time, value, money calculations, the emotional toll on the litigants; and uncertainty can make mediation an attractive alternative. But parties often feel that mediation is too expensive to be a viable alternative, or takes too long, or is just not successful at times leaving the parties with more frustration than they can bear.

What Can the Mediator Do to Reduce the Cost?

Because the hourly rates for mediators are constants, the variable that determines the cost of the mediation is the time expended. In the face of the challenges to resolution, the mediator needs to be efficient and work smart. There is a fine line between spending sufficient or an insufficient amount of time with the parties in private meetings. Most mediators know that even though he or she is exercising every effort to keep the discussions moving forward, the parties waiting in another room often feel forgotten.

Mediators are often faced with a multifaceted problem from one side, or both, that requires teasing apart the impediments to settlement. The impediments may even come from the lawyers independent from their clients. For example, they may harbor animosity from the manner in which discovery was carried out. In complex business mediations, long-term partners and even family members may use mediation as a forum to unload frustrations that have built up for years. And these challenges often do not, or should not, prevent the case from settling. When the case, for example, involves the death of a child, the discussion with the family is usually broad-based. It may require the mediator to cover a number of issues and require empathic interaction with the survivors.

Like a complex recording of music, the discussions at mediation may have multiple tracks. Continuing the metaphor, the drum track, the bass line, the vocal tracks, guitar tracks, keyboard tracks, and orchestral tracks may be represented in the mediation as the money track, the emotional track, the catharsis track, the anger track, and the practical track all of which must be woven into the ultimate decision to settle the case. The skillful mediator identifies the various tracks early on and from the outset seeks to harmonize the discussion that leads to settlement.

What Can Counsel Do to Reduce the Time/Cost of Mediation?

1) Counsel should make sure they are fully prepared to address the good, the bad, and the ugly in the case and thereby improve the ability to strongly negotiate. With few exceptions, every case has a downside risk and negative facts that must be dealt with. The lawyers that recognize this, hitting any negative facts head-on are often more credible than the lawyer

who simply denies the existence of such information-this will shorten the proceedings substantially by avoiding needless discussions about non-issues.

2) Counsel needs to spend time with the clients before the mediation (not the morning of) to thoroughly review the process and educate the client on what to anticipate. It is a matter of informed consent. Going into the mediation the client should be familiar with the process and all material facts upon which they can make an informed decision regarding settlement.

3) Counsel should have a conversation with the opposition, where possible, to talk about the options at mediation. For example, if there are going to be confidential briefs, the opposition should be advised so they don't feel sandbagged. The failure to do can create distrust. Consider the option of filing a brief that can be published to all participants and a supplemental confidential letter to the mediator to talk about matters that should remain confidential at the outset of the proceeding.

4) Make sure all persons involved in the decision-making process are present or available. It may be a husband, wife, CEO or other members of an LLC. There is nothing more frustrating than one side appearing through counsel only with no client or representative. It can destroy the ability to settle the case. If the circumstances require a decision-maker to appear by phone, let the opposition know ahead of time. The advance notice will usually be appreciated.

5) In talking with other counsel before the mediation see if you can narrow the issues. Maybe liability is something you agree doesn't need to be discussed at mediation. Sometimes the parties can reach agreement on the medical bills, Medicare issues, or the important reports or minutes concerning a business dispute. In agreeing to identify the central issues and documents, you can quickly focus the mediator on the issues at hand, rather than presenting with a banker’s box full of documents as if you were going to trial.

Admittedly, every case is different, and sometimes showing up with trial materials and presentations can be effective in the negotiations. But think about what you intend to use at mediation, communicate with the opposition and see if there are areas of agreement that might streamline the process.

Scheduling

Reach a consensus with the opposition on the estimated time for the mediation. You can book two hours, three hours, a half-day or whatever is your best estimate. The key is to be realistic.

Conclusion

With the anemic economy, underfunding of the courts, and expense of litigation, mediation remains an effective tool to resolve disputes. However, in order to make it both effective and economical, counsel, the mediator and the parties need to prepare, exchange information where appropriate and make the most of the time set aside. The resolution of a case at mediation is well worth the investment. With sufficient preparation, you can be assured to get your money's worth. And the settlement of a case frees the litigants from being entangled in litigation that is expensive and seemingly endless.