Maximizing Your Potential for Success at Mediation

By: Honorable John P. DiBlasi, former Justice of the Supreme Court of the State of New York

Judge DiBlasi is a former presiding Justice of the Commercial Division of the Supreme Court of the State of New York and is exclusively affiliated with National Arbitration & Mediation (NAM). He was recently ranked in the 2012 New York Law Journal Survey as one of the top mediators in all categories.

INTRODUCTION

There is no better way to settle your case than through mediation. The purpose of this article is to make suggestions to maximize your opportunities for success. As a full-time mediator, by virtue of sheer volume, you are involved in the resolution of more cases in one month than most attorneys are in their entire career. Because of that experience, you begin to observe distinct patterns that serve as a guide to what counsel can do to make the most of this process. Many lawyers and their clients do not fully understand the process, which leads to numerous mistakes that often doom their best efforts (and those of the mediator) to bring the case to a successful resolution. This article will focus on the process itself, what can be done to improve your chances for success, and what mistakes may be avoided.

PREPARING FOR THE MEDIATION

The success or failure of the alternative dispute resolution process is all too often predetermined. Whatever the nature of the case, counsel's preparation will often govern whether the process is successful or not. The parties should carefully review the mediation agreement and any written guidelines presented by the mediator. The strategy should be to position the case for settlement in advance. One of the first questions I ask the parties is: "What gave rise to the mediation?" Surprisingly, most parties often give answers like: "I thought it would be a good idea", or "The other side wanted it." Often times, the latter assertion is then denied. This belies the fact that often insufficient preparation and thought is given to the process in advance. The preparation for mediation should be similar to the preparation that one would engage in for trial. Know why you are there, understand where you want to finish, and make sure your clients are well informed.

Creation of Parameters

Frequently, the parties do not discuss any parameters for the mediation in advance. The initial session then becomes bogged down by the issue of what the demand/offer was prior to the time the parties came to the mediation. This can often lead to a breakdown of negotiations and ill will.

Parties should not agree to mediate unless they have a good faith belief that the case has a chance of settling. While this is not an exact science, specific demands should be communicated in advance, along with any offers made in response. The parties often come to the mediation where no demand or offer has been communicated, there is a disagreement as to same, or off-the-record discussions have led to complete confusion regarding the parties' positions. The best way to avoid this is with clear communication, preferably in writing, confirming discussions of the parties. At minimum, this will avoid situations where the defendant is hearing the plaintiff's demand for the first time during the joint session of the mediation.

Demands communicated in advance are often met with a refusal to make a counter offer unless the demand is immediately reduced. Such a position by the defendant should be communicated prior to the mediation. The process should not be utilized to bring a party to the table where there is no intention of responding to demands, and with the hope that the mediator will compel the other side to reduce same without an offer. There is also the scenario where a demand has been communicated in advance by the plaintiff only to have it increased at the outset of the mediation. Often it is the parties' expectation that the mediator will somehow be able to take a case where any or all of the above risk factors exist and bring it under control. While this may be possible, conduct such as this should be avoided.

Finally, if a demand has been made prior to the mediation and a significant factor comes up that may impact the negotiations (such as a change in the claim for damages), this should be communicated in advance. It will give the defendant the opportunity to re-evaluate its settlement position, and to determine whether the mediation should proceed.

Submission of Briefs

In the majority of cases, briefs are submitted. Under most mediation agreements the parties are free to submit same confidentially for the mediator's review alone. Counsel often do not read the mediation agreement (which sets forth the rules for submissions) and are taken by surprise when a party has appropriately given the mediator a confidential submission.

Unless you are conveying critical information that you wish to withhold for trial, you should exchange the brief with the opposition so they might better understand your position in advance. Care must be exercised in communicating critical information that is being withheld for trial even when this information is being provided to the mediator. Further, despite the rule allowing confidential submissions, when one party has exchanged their mediation brief and the other has chosen not to, it tends to breed distrust.

Briefs frequently resemble motion papers I reviewed as a judge. Many are completely redundant and premised upon the assumption that the more an argument is repeated the more likely it will be accepted. This should be avoided. The brief should be simple and clear, and designed to educate both the opposition and the mediator as to the basic principles of your position. Parties often submit kitchen sink attachments containing exhibits that are not necessary. This should also be avoided. The further in advance the brief is submitted the better for all concerned, as this allows sufficient time for review and consideration.

Presence of the Client at the Mediation

Counsel frequently face the decision of whether or not the client should be present at the mediation. Whether the client is the CEO of a corporation or someone suing in their individual capacity, most have an emotional investment in the case. I've mediated cases in numerous states including Connecticut, Florida, Illinois, Massachusetts, and Nevada, where it is expected if not required that the client be present. Although this is not the case in New York, the person with the ultimate authority to settle the case should be present. It is important for the party to be present during settlement discussions to better understand same, and for the mediator to speak directly with them if needed. If your client is going to testify at a trial and makes a good presentation it behooves counsel to have them present to meet with the opposing party’s representatives.

Counsel should never assume that the party will be present. If this is a condition to the mediation, it should be set forth in the mediation agreement as it will avoid one of the parties walking out in the other party's absence. Attorneys often do not bring the client as they fear they will be antagonized by the process. While this is understandable, the benefits usually outweigh the risk. Further, when one side brings their client and the other does not, it creates an issue of trust based on whether counsel has the authority to settle the case.

Preparing the Client

Preparing the client for the mediation itself must be approached with the same seriousness as preparing them for trial. Assuming the client has limited or no familiarity with the ADR process, you must explain why the mediation is being conducted, the benefits of the alternative dispute resolution process, what the role of the mediator is, how the mediator is selected, and how mediation is conducted. Many clients equate mediation to a trial; in other words, a win-lose proposition. They do not clearly understand the advantages of the process as opposed to the court system, view the mediator as a judge as opposed to a facilitator and negotiator, do not understand how the mediator is selected, are not familiar with his or her background, and do not understand how the process itself is conducted. All of these areas should be discussed with the client in advance.

Counsel must explain to the client that everyone will have to compromise their settlement position and that even if both parties make concessions that does not mean that the mediation will result in a settlement. If the client is properly prepared and understands the process it makes it much easier for the attorneys to gain their acceptance of a compromise, and, if called upon, for the mediator to discuss the merits of the proposed settlement with them.

Demonstrative Evidence

The complexity of the case will determine what demonstrative evidence may be brought to the mediation. Bringing exhibits that have been prepared for presentation to a jury conveys the impression that the party is serious about trying the case if the mediation does not result in a settlement. While this may or may not impress, in complex cases I have seen the effective use of same and the use of PowerPoint presentations that organize and simplify the many components of the case for the purposes of presentation at the initial joint session.

JOINT SESSION

The joint session is the first opportunity to present one's position in person to both the mediator and opposing counsel. This is rarely waived, although there are instances when the attorneys have had such extensive pre-mediation negotiations that they ask to split up immediately and talk to the mediator separately. There is also the rare circumstance where the hostility between the parties is so great that they waive the joint session, as they do not want to be in the same room together. This leads to the question as to why they agreed to the process in the first place.

Presence of the Client during the Joint Session

If the client is at the mediation, whether they should be present during the joint session must be decided. Outside of the State of New York, the presence of the party is expected, if not mandated, at the joint session. In the State of New York in many cases corporate representatives will be present but the individual plaintiff will not be. In making a determination as to whether the client should be at the session, there is usually a direct correlation between emotional involvement and the likelihood of the client becoming antagonized by hearing opposing counsel’s opening statement. If there is any chance of this, it is my opinion that they should be excluded from the joint session. It will be more difficult for counsel to get the client to compromise if they feel that their veracity is being questioned. However, in some cases having the client present can be useful. Hearing from the opposite side the basis of what their position is can lead to better understanding of the weaknesses of their case, as long as this is presented in a respectful manner.

Frequently when the client is present during the joint session, counsel may engage in grandstanding. Understandably, it is necessary to make one's client feel that their counsel is a true advocate for their position, but an overzealous presentation can antagonize the opposing side and inflate your client's expectations with respect to settlement. A careful balance must be struck in this regard.

Communication of Settlement Position

Many people do not want to confront another person directly when involved in a real conflict. However, the person on the other side of the table is the one you have to convince to compromise. It is more important that the communication go back and forth directly between the parties during the joint session. You will have ample opportunity to lobby the mediator during the break out session. Parties come to the mediation with the assumption that after years of litigation they understand the position of their adversary and vice versa. While this is sometimes true in part, it is never wholly true. The factors that a party believes supports their view of the dispute are sometimes being heard for the first time by the opposing party. It is far better to address the opposing party directly and to explain your position, than to attempt to make what becomes an oral argument to the mediator as if he were a judge deciding the case. Again, a mediator understands that attorneys are attempting to sell them on the strength of their position so that he or she will push the opposition towards a settlement, but this is not necessary, as the mediator will do this as a matter of course. The human dynamic requires that communication take place between the parties. The attorneys most adept at settling cases understand this fundamental fact. It is particularly useful to end your presentation by saying that you are there in good faith to settle the case, to listen, and to give fair consideration to the position of the other side. While this may sound trite, it is critically important as it sets the tone for the continued negotiations.

BREAK OUT SESSIONS

The Client and the Mediator

One of the first things counsel must consider is whether the mediator should meet with their client and at what point that should occur. From my experience, if the client is not present at the opening session, the first meeting should take place as soon as possible thereafter. It gives the mediator the opportunity to explain the process, his role and experience, and how the day will progress. The mediator will have some basis to assess how the client may appear before a jury and it is an opportunity for the mediator to build a rapport with the client in the event that the mediator must speak to them later in the process regarding proposed offers. At the same time, counsel should use the mediator to emphasize that both sides will have to engage in compromise to achieve a resolution. The meeting with the mediator also gives the client an opportunity to

tell their story. From my experience as a Supreme Court Justice, one of the biggest complaints in court made by litigants is that they were never heard before entering into a settlement agreement. The ability to tell the mediator their version of the case is unique to the mediation process and one of its most valuable aspects. It gives every litigant what they want, which is a chance to be heard by a neutral party and voice their feelings. This can result in the client becoming more willing to compromise, and it also gives the mediator a better understanding of the case, which can become critical in facilitating the negotiations.

During the course of the breakout sessions, the parties should consider using the mediator to speak with their client to explain what has transpired in the process and what factors should be considered in making a decision with respect to the settlement. What is not advisable is to have counsel attempt to bolster what the mediator is saying and strong-arm the client in the mediator's presence. It often embarrasses and angers the client, and defeats the purpose of having a neutral give a candid opinion on the status of the negotiation. It is ineffective for the mediator to push the client hard as people generally just do not respond to that sort of pressure. My tactic is to suggest to the client that they are well represented and should give the advice of their counsel serious consideration. Their attorneys are then in a position to use the factors explained by the mediator to move the client towards acceptance of a settlement that they believe is advisable. No matter how many times you tell the client that you are not a judge, they view the mediator as same and expect you to be fair, impartial and level.

Clarity in Communication

In communicating with the mediator, counsel should be exceedingly clear on the message that is to be conveyed to the opposing party. I take great care in clarifying what it is that counsel wishes to convey to the opposition. If you are not clear, and the mediator is not clear, this will result in a serious misunderstanding that can lead to the breakdown of negotiations. I will often pose the open-ended question of what it is exactly that counsel wants me to communicate to the opposing side. The response often heard is “Phrase it in any way you deem appropriate." Mediators will routinely do this but it may become a dangerous proposition for both the party and the mediator. Attorneys fixate on the words of the mediator and exactly what is being said. They often write down exactly what was said by the mediator and convey it to their clients. Any error in this fashion on either side can compromise the negotiation. Great care then must be taken in exactly what you intend to communicate through the neutral, so that he may exercise his discretion accordingly.

There reaches a point in every mediation where the mediator has a clearly defined sense of what each party is willing to do to get the case settled, but is not authorized to communicate that information in a specific way. The techniques that I use to convey this message are tailored to each mediation. While this is always useful when the parties are getting close to a resolution, it is important for

the mediator to make clear that this is not an offer but a range of discussion. The parties usually read between the lines, but again, exercise care in how you authorize the mediator to communicate generalized positions.

Finally, if you suggest a proposed settlement to the mediator, be sure you have the approval of your client. You compromise your credibility and that of the mediator when opposing counsel has agreed to the proposal only to find out that your client will not consent to same.

Evaluation by the Mediator

During the course of breakout sessions, attorneys on both sides want an evaluation of the case. It is better to give the mediator the opportunity to speak to the clients and go through several breakout sessions to fully understand the respective positions before giving an opinion. Parties must remember that while a mediator will apply significant pressure to each side to produce a settlement, he is not an advocate for either side, but an advocate for compromise and resolution. The mediator is tasked with maintaining a position of fairness while attempting to get the parties to understand the position of the other side. This is the most critical part of the mediator's function. The position advanced during the break out sessions becomes more significant than what was advanced in the joint session. There is an evolution in the negotiation process where a good mediator will become aware of factors that both sides have not considered, or lesser factors that take on a greater significance. The parties should make use of this time to narrow the points they're trying to make and to communicate in a structured fashion. Finally, if you ask the mediator for an evaluation, please listen. A mediator is often confronted by a party who is not hearing what they want to hear and refuses to consider it. If you ask for an opinion at least give it consideration. Further, whether asked for an evaluation or not, a mediator is going to discuss the factors that you should consider in settling the case. Again, listen, whether or not you like what you are hearing.

Effective Use of Time

The greatest ally of the mediator and the parties during the course of the mediation is time. While my personal style is to take control of the mediation and to move it quickly and efficiently, there is no doubt that the parties need adequate time to consider the demands and offers being made and to be given a real opportunity to reflect on same. Parties completely wedded to their positions are more likely to compromise if given sufficient time to consider the demand or offer being made. There is often "buyer's remorse" at the end of mediation, but this happens less often when the parties had adequate time to make their decision. Additionally, if a party has to capitulate, the "loss of face" is a problem the mediator must manage. The more time that passes, the easier it becomes for a party to soften their position.

IMPASSE

Breaking the Impasse

The negotiation process should always be one of movement. I often hear the excuse that another offer will not be made because counsel does not want to insult the other party. As an attorney once said to me: “If they keep insulting me, we will probably get the case settled.” Even if the concession is slight, this will keep the dialogue moving forward. In many cases the prospective “insult” continues the process and leads to a dialogue where a settlement is reached.

When the parties reach an impasse in negotiations, it becomes incumbent upon the mediator to slow the process and encourage the parties to continue negotiation. Counsel will often become angered by an unacceptable move late in the mediation and will want to walk out without further discussion. Often this is an egocentric knee-jerk reaction, which results in the lost opportunity to take one last crack at the negotiations which may often break the impasse and lead to a settlement.

No matter how effective the mediator is at conveying the position of the other side, a filter is inevitably created. No matter how clear the mediator may be in transmitting the position of the parties, nothing is as effective as the parties speaking directly. At this point, the parties should follow the mediator’s suggestion to reconvene in a joint session and talk face to face. In observing the ‘impasse process’ at countless mediations, in my experience it may be broken simply by bringing the parties back to the negotiating table and insisting that they continue to talk. Communicating face-to-face will often soften resistance. The important thing is to accept the mediator's recommendation that you meet in person and not merely walk away from the bargaining table.

In the event the impasse cannot be broken, if the neutral does not do so automatically, the parties should request the mediator to summarize the status of the negotiations for two purposes. The first is to ensure that the parties are clear on what the final demand and offer is. It should also be made clear that during the negotiations any generalized suggestions as to range of settlement are just suggestions, and not demands or offers. Second, the parties should be reminded of the confidentiality provision contained in the agreement to mediate, and that unless consent is given the negotiations are not to be discussed before the Court. Obviously, this is something that a mediator cannot enforce, but parties should be reminded of their ethical obligation to abide by the terms of the mediation agreement.

POST-MEDIATION AGREEMENT

When the Case Settles

The post-mediation agreement should be executed before the parties leave. It should be reduced to writing and carefully encompass all of the terms of the settlement. While the case may be in litigation, and the settlement subject to the exchange of a satisfactory stipulation of discontinuance and general release, it is the better practice to have the client sign the post-mediation agreement in the presence of the mediator. As discussed supra, upon leaving the mediation, clients often experience “buyer’s remorse.” I know instances where some refuse to proceed with the settlement because of this. The post-mediation agreement serves as a basis to enforce a settlement. It also protects counsel from a client who denies that authorization to enter into same was given.

Many times once a verbal settlement agreement is reached, one of the parties will begin to add conditions to the settlement that were not raised during the mediation process. It begins an entirely new mediation devoted to dealing with terms that were not contemplated. Counsel and mediator should specifically raise the issue of any special conditions before a final settlement is agreed to. However, I have had instances where despite my inquiring regarding same, counsel has withheld terms and conditions that the settlement is contingent upon. To conduct the negotiation in such a fashion is, at minimum, bad faith.

WHEN THE CASE DOES NOT SETTLE

As discussed supra, it should be explained to the client that the process is not a trial, and that this is not a win-lose exercise. One of the reasons to do this is to avoid the client feeling that they've experienced a loss when the case does not settle. The mediator and counsel should stress to them the fact that many mediations do not result in a settlement and that it is not a reflection on their case. It is just the position of the parties at that time which cannot be sufficiently compromised to reach an agreement. Counsel must understand the same thing, to wit, not every case can be settled via mediation. However, all mediations are productive even if all they do is open the lines of communication and give each side the opportunity to clarify their position to opposing counsel.

I have never found it to be productive for counsel to end the mediation with their colleagues in a hostile manner. I understand the immense frustration that the parties may experience when a case does not settle or they do not like the way the negotiations progressed. Counsel should commit to keep the lines of communication open and hopefully in the future the dialogue can be continued. It never serves a party to leave mediation in a hostile manner where words are exchanged that can never be taken back. The mediator must keep this phase of the process as productive and calm as possible by attempting to show that, despite the fact that the case is not settled, progress has been made. My practice is also to follow up on every case that I mediate which does not settle. I offer the parties the opportunity to continue negotiations informally, without further expense. My experience has been that by reaching out to the parties after they have had time to absorb what took place during the dispute resolution process, it

will trigger further negotiations that in the majority of times will lead to a settlement. Counsel should always avail themselves of any offer by the mediator to continue negotiations.

CONCLUSION

It is always my hope that every case that I mediate will settle, but that is not realistic. This article cannot in any way encompass all of the numerous factors that will lead to a resolution at mediation. Hopefully it will serve as a starting point to lead counsel through the process, and hopefully maximize the opportunity for success.