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VIEWPOINT: 10 tips, plus one, to help counsel focus on the important aspects of successful mediation.

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Often, when parties appear at mediation, they approach the process as an opportunity to "hammer" the other side. Their concept of how to do that consists of only a vague notion of being a tough negotiator. The following suggestions may help counsel achieving the clients' goals at mediation.

1. Don't Hide the Ball

The mediator is a neutral party, obtaining confidential information from all sides. And just because the mediator is talking confidentially to the other side doesn't mean that the mediator is unworthy of confidences. To effectively mediate a dispute, a mediator must be able to advocate a position. To the extent the mediator does not know the facts, advocacy is undermined because the mediator will be less well-equipped to anticipate arguments coming from the other side.

Counsel must be certain of the mediator's policy with respect to disclosure. Some mediators take the position that they will disclose matters discussed in private caucus, unless specifically instructed not to do so. Others will treat everything as confidential, unless specifically authorized to disclose the information.

2. Submit Mediation Briefs

Briefs are not only helpful to the mediator, they are essential to obtaining the best result for the client, especially if the issues are complex. Counsel should not forego the preparation of briefs simply because the case appears to be easy to explain to the mediator.

A brief in advance of the mediation gives the mediator the opportunity to prepare and to give some thought to approaches that might be effective. If revelatory evidence exists, it is helpful if the mediator has an opportunity to consider the impact of that evidence in advance.

A mediation brief goes a long way toward helping the mediator advocate every position to the opposition.

3. Work on Client Attitude

It is helpful if the client arrives with the attitude that the mediation is likely to result in a settlement. This allows the client to maintain a patient and objective outlook in negotiating a settlement. This may be especially difficult in court-ordered mediation.

But even if the parties are not in a position to settle the matter in its entirety, a mediation can be successful if it moves the parties toward settlement or creates an atmosphere in which settlement is possible. No matter how pessimistic counsel might be that the case will not settle, imparting that pessimism to the client is counterproductive.

Rather, counsel should advise the client that successful mediations includes those which move the parties in a direction that makes settlement possible in the future, as well as those resulting in agreements for exchanges of information that minimizes litigation costs.

4. Keep Open Minds

When parties approach mediation believing they are completely correct, and that there is nothing of value to be offered by the other party, they are risking a trip down a slippery slope. Counsel and clients should start with the premise that, expect in rare cases, parties achieve better overall results through settlement than through trial.

Counsel should welcome the opportunity to evaluate what the other party has to say, or what the neutral mediator has to say. An open mind allows counsel to digest the client's chances at trial more accurately, especially with a mediator who takes an evaluative approach. Counsel can weigh the value of what is being offered now against waiting years to, perhaps, achieve a higher gross award. That higher gross award years from now may actually net the client less than what is being offered.

5. Suggest Solutions

Look for opportunities to settle the case. Preparation for mediation should include thinking of potential solutions.

Many attorneys are reluctant to offer solutions to resolve a dispute because they believe that a solution proposed by one of the parties is less likely to be accepted by the other. If that is a concern, counsel should propose a solution in private caucus and tell the mediator that the proposal may be presented as a suggestion from the mediator.

An attorney who has lived with the case for some months, if not years, is likely to be in a better position to know his client's concerns and some of the conflicts between the parties that may be addressed in a settlement. A party to a dispute may be able to suggest a resolution that will work, based upon interaction with the other party. This is especially useful in disputes involving individuals who may interact in the future.

6. Contact the Mediator

Many mediators contact the parties' attorneys prior to the mediation session, which gives the mediator insight into the position of each of the parties, as well as problems, personality conflicts and the dynamics of the dispute. Counsel should be prepared for this contact and think about explaining particular difficulties with the other side as well as the client to the extent possible considering the limits of the attorney-client privilege.

This contact is useful because it dictates how the mediator begins the session. If the parties have a particular conflict, it may lead the mediator to conclude that a separate caucus would be the best way to begin, or that a joint session might prove to be the most useful starting point.

If the mediator does not contact counsel, counsel should contact the mediator.

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7. Adjust Client Expectations

An effective advocate takes a realistic view of his client's case while forcefully arguing that case to the other side. It is also important that the client see counsel as an advocate for the client's position. This does not mean that counsel should promise the client unrealistic results, no matter how tempting, from a marketing standpoint.

Unreasonable expectations are an obstacle to overcome. They create a feeling in the client that the client is giving up something in situations where the client is only giving up unreasonable expectations.

8. Avoid Ego

Counsel should not try to run the show at the mediation. Every mediator has an individual style and needs room to work.

A mediator must have credibility with both parties. Pitting counsel's own ego against that of the mediator can undermine the settlement process because it undermines the neutral's credibility. This does not mean, however, that counsel should not be a forceful advocate. Counsel must not ignore matters contrary to the client's interests.

Sometimes, a mediator expresses an opinion as to whether a party's position is likely to appeal to a judge or jury, and the attorney has a contrary opinion. There is certainly nothing wrong disagreeing with a mediator's evaluation.

However, counsel should not hold on to a position simply because counsel has expressed strongly to the client prior to the mediation and counsel believes the client will think less of the advocate.

9. Use the Mediator

The mediator can be an excellent sounding board for arguments that counsel intends to make at trial. Even if a case does not settle, the mediator's comments may give insight into how a trier of fact might view the evidence. So counsel should present the evidence to the mediator and solicit the neutral's views on the persuasiveness of counsel's arguments.

The mediator can also fill a role that counsel, as an advocate, cannot, without leading the client to think that counsel does not have faith in the case. This is useful where the client's true goals cannot be achieved at trial.

For example, in a dispute between business partners, family members or neighbors, the client's true goal may be impossible to achieve at trial, because of the need to continue to interact with the other party. Those issues may have to be addressed before any resolution is possible.

Counsel should advise the mediator of these issues.

10. Have Patience

Mediation requires the mediator to understand what is driving the dispute in order to effectively advocate the parties' positions to each other. This takes time.

The mediator's role is to put the parties in the best position to reach a settlement, not to push the parties toward settlement as soon as possible. The latter could jeopardize the opportunity to reach settlement, and may actually harden the parties' views toward each other.

11. Get the Best Evidence

If an expert can best present the evidence, counsel should produce the expert. If counsel has dynamite trial exhibits, bring them. The only caveat is to try to avoid undermining trial strategy and leave behind exhibits that, if presented, would allow the other side to prepare to a degree it would not otherwise. However, generally, it is more effective, and will help achieve superior settlement results, if counsel strongly conveys to the other side the following information:

- Counsel knows the case
- Counsel is well-prepared
- Counsel is not afraid to go to trial and will spend what is necessary to win if the case does not settle
- Counsel does not care if the other side learns the case, because no matter what the other side knows, the advocate has such a strong position, the other side can not counter it.