

Spring 2015, Vol. 29 No. 1

TABLE OF CONTENTS

Articles »

[How Lawyers Can Be the Most Effective Advocates in a Mediation](#)

By Leslie A. Berkoff

The proper steps to help best prepare the mediator, the other side, and your client for the process.

[Whether to Opt Out of Antitrust Class Actions: A Four-Step Checklist](#)

By Charles H. Samel and Cori Gordon Moore

What is your company's process for deciding whether to opt out of antitrust class actions?

[New York Lawmakers Agree on a 10-Year Extension of Brownfield Law](#)

By Steven C. Russo and Robert M. Rosenthal

Despite the revisions, the New York BCP will continue to provide significant tax incentives to developers seeking to clean up and redevelop contaminated sites.

[E-Discovery in Government Investigations: An Introduction](#)

By Adam M. Reich

Basic guidance for attorneys new to counseling clients regarding production of ESI.

News & Developments »

[SCOTUS Lets Stand Decision in Favor of CA Truck Drivers](#)

The Court refused to consider whether preemption applies to California worker-protection laws.

[Are You a Good Supervisor? Tips to Improve Your Supervising Skills](#)

A summary of the points and advice from a discussion recently moderated by the ABA's Career Center and Center for Professional Development.

ARTICLES

How Lawyers Can Be the Most Effective Advocates in a Mediation

By Leslie A. Berkoff – May 26, 2015

Mediation is a collaborative process that allows parties to reach a resolution in a way that is far more flexible than through a court proceeding. The parties' ability in a mediation to determine the resolution of their dispute is a unique possibility in any area of the law.

Winning in a mediation is about securing, to the extent possible, the interests that are most important to all the participants. Scott Brown, "Seeing the Light: From Litigation to Mediation," *ABI J.*, June 2013. The mediator-advocate's approach to the mediation process from beginning to end can play a significant part in whether a mediation is successful in resolving the issues at hand, as well as producing a positive result for the client.

The path to a successful mediation begins with the selection of the mediator. In the selection of a mediator, unlike the assignment of a judge to a case, parties have the ability to participate. The mediator that is ultimately chosen will play a critical part in the mediation process. Do not be shy about asking to interview the mediator or even requesting that the mediator provide recommendations from participants in past mediations. You can even consider polling colleagues to ascertain their experience with a proposed mediator. Any screening process should closely examine whether the mediator has familiarity with the relevant area of the law.

In addition, you should consider the mediator's personality traits in relation to your client's and the adversary's. And the dynamics of the case may call for a more authoritative figure or a creative one.

Once the mediator has been selected, it is entirely appropriate to speak to the mediator privately in advance of the mediation process. While some parties mistakenly view this as if they are "winning over the mediator" to their side, most mediators practice under a construct of being facilitative in the process, not determinative. (Note, however, that there are mediators who are hired to be evaluative, and at times this is a significant opportunity for former judges. See Hon. Cecelia G. Morris & Cheryl J. Lee, "From Behind the Bench: Toward an Efficient Mediation Model—Evaluative Mediation in Bankruptcy," *Norton Bankr. L. Adviser*, Apr. 2007, at 6.

During these pre-mediation calls, your goal should be to educate the mediator. This will include sharing the concerns of your client in the litigation or even the mediation itself; identifying possible key stumbling blocks to the process; highlighting certain "personality" issues or raising concern that the presence of certain parties in the process could be constructive or destructive. Along these lines, if there is someone whom you feel the other side must absolutely bring, identify that as an issue so it is discussed in advance of the mediation session. Imparting your "institutional" knowledge of the dispute can be tremendously helpful for the mediator. Remember that your goal is to have a successful process. With the right tools, a good mediator can structure a more successful process if he or she is not blind to key points and hot-button issues.

The next step in the process will normally be preparing a mediation statement. Too often this document becomes nothing more than either a regurgitation of the motions that may have been filed with the court or a brief on the law in the area and perhaps some key facts. However, this statement should not be just a recitation of case law and argument; it should be a settlement-focused document designed to educate the other side on the key points of strength in your position. Elayne E. Greenberg, "Starting Here, Starting Now, Using the Lawyer as Impasse Breaker During the Pre-Mediation Phase," in *Definitive Creative Impasse-Breaking Techniques in Mediation* (Molly Klapper

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ed., New York State Bar Ass'n 2011). You are not really arguing your case to the mediator, who is not deciding it, but you do want to be clear and concise on the critical points of fact and law because this will help guide the mediator through the process.

Lawyers should be mindful that a mediator is oftentimes stepping into the process midway through. It is important that in preparing statements to be produced to the mediator, the parties clearly and succinctly lay out their arguments, supporting facts, and case law, as well as outline their settlement position, authority, and range. This enables the mediator to focus efficiently on the key issues at hand and to ascertain whether there may be common ground and potential for agreement and compromise. In addition, emphasis will also be placed on areas where the positions are so divergent that attention to structuring the mediation is necessary, to facilitate any resolution.

Moreover, the pre-mediation statement is a great opportunity to educate the other side about the strengths of your case so that it enters the mediation in a settlement-focused frame of mind. Thus, you should include a factual, legal, and procedural history of the litigation. Be sure to identify prior efforts at settlement as well as any upcoming key court dates. Sharing analysis can be a very useful tool if appropriately employed. While there are certainly strategic considerations in not sharing every key legal point, at a minimum consider sharing those with the mediator in a separate confidential statement. Don't miss the chance to use this document as a great opportunity to also educate the mediator about any of the kinds of issues that may have, or should have, come up in the pre-mediation call. Moreover, once you have had a chance to review the other side's mediation statement, there may be a critical point or two that you want to focus the mediator on for the mediation.

Also be sure that, in advance of the mediation, the client is educated about the process so that the client is properly prepared for the day's events. While you may have been a participant in multiple mediations, most likely your client has not. If you fully inform the client about how the process runs, the time lags that occur during the separate caucuses, as well as the purpose and meaning of joint sessions, your client can be better prepared for all the developments that follow. Confidentiality rules should also be reviewed with the client, and, to the extent appropriate, you should ensure that your client does not raise "new" and surprising points in open session or in front of the mediator without your first having a chance to vet and counsel your client in this regard.

Prior to the mediation, you should also be sure that your client has crystallized a set of goals or a wish list in advance—specifically what the client really wants, or needs, to get out of the mediation. You should be sure that the right party is coming to the mediation. Review this with your client: Nothing chills or derails the process more than not having the right decision maker there or the party with the right knowledge. Be sure that tax consequences are considered, as those can be critical during the process and being prepared in advance is important.

Provided that you meet with success during the process and reach an agreement, be sure that the mediation does not conclude without a written term sheet that has been agreed to and signed by both sides. Too often the desire to close out the day because an agreement has presumably been reached can result in remorse the next day, or week after, when the parties suddenly have divergent recollections of the specifics of the deal.

One court has described mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." *Cook Children's Med. Ctr. v. New England PPO Plan of Gen. Consol. Mgmt.*, 491 F.3d 266, 276 (5th Cir. 2007) (quoting Uniform Mediation Act § 2 (2001)). If you as the lawyer-advocate take the proper steps to help best prepare the mediator, the other side, and your client for the process, then this can be the means to secure a resolution that works for your client.

Keywords: litigation, corporate counsel, mediation, advocate, pre-mediation statement, pre-mediation call

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