Mediation and Alternative Dispute Resolution
Tips and Techniques for In-House Counsel and Litigation Counsel

In this paper and the panel discussion we will consider the ins and outs of maximizing the benefits of mediation. While parties at times mediate prior to the initiation of litigation, for our purposes we consider mediation after suit has been filed.

When

You need to have enough facts to participate intelligently. On the old game show *Let's Make a Deal*, a contestant would be called upon to exchange some prize he or she had already won for what was behind Door Number 2. They of course did not know what was behind Door Number 2 before the decision had to be made.

If the prize in hand were something of limited value, say 120 used sponges, or of great value, a brand new Oldsmobile, the choice would be simple. But if the assets they had already acquired on the program had considerable but not life changing value, i.e., a washer and dryer, the contestant would have to make a wholly uniformed decision. That might make for good television, but litigants of course do not want to be forced to make wholly uninformed decisions. They would be foolhardy to mediate while only knowing their side of the story.

At the same time, cost benefit analysis would dictate against waiting until jury selection to mediate. While the litigants would have the benefit of having all discovery having been completed, they would have already borne the entirety of the litigation expense other than for the trial itself. That would be inconsistent with one of the key motivations for mediating at all.

So when is the right time? Unfortunately, the answer is that it depends on the circumstances. The client and counsel have to determine when they have sufficient information to assess the risk and expense posed by the litigation. Circumstances militating toward earlier mediation would include:

a. Significant pre-litigation dialogue between the parties such that your side understands the other side's position and the factual and legal basis for that position;

b. The majority of the witnesses and documents are under the control of the client, and you have had the opportunity to examine both;

c. You are aware of key detrimental facts or documents that the other side does not know about but will become aware of should discovery ensue further;

d. You have reason to believe that opposing counsel or the opposing party have "scorched earth" litigation in mind;

e. You believe that the discovery undertaken already allows you to assess the case sufficiently to allow you to make informed decisions at the mediation;

f. The anticipated costs of defense are likely to be so significant that an early settlement would be commercially pragmatic; and/or,

g. There are long-term commercial relations with the other party that must be preserved.

Roles of Players

This question too depends on the particular circumstances presented. Factors to be considered are:

a. Who is best situated to open the client's presentation? Having the corporate decision-maker open the company's presentation can satisfy a number of purposes.

   i. It sets the tone: commercial, pragmatic, solution-driven.

   ii. It provides assurance to the other side that the client is there to listen with its ears and minds wide open.

   iii. It establishes the client's expectations:

      a. That the other side likewise is there to listen with its ears and minds wide open;

      b. That everyone will treat each other and his/her views respectfully.

      c. That mediation works if and only if both sides have come with the expectation of compromising;

      d. That while both sides have firm views on the facts and claims, they nevertheless commit to each other that they are prepared to compromise; and we fully expect that the other side is equally committed

      e. That both sides are prepared to work with the other side to achieve a commercially reasonable resolution, based on a reasoned assessment of the parties' respective risks, the costs of going forward and the need (assuming it still exists) to preserve the parties' commercial relationship.

Such presentations however may not be in the decision-maker's "wheelhouse," (i.e., skill set), and, notwithstanding evidentiary limitations, if the decision maker will ultimately serve as a witness, what he or she says could serve to aid the opponent in cross examining him or her when the situation arises.

As a consequence, either in-house counsel or the litigation attorney may be better suited to that task. If the former had been intimately involved in trying to avoid the underlying dispute he or she may be the person most qualified to lay out the client's position, having insight as to the dispute, as to the individuals on both sides who were involved in the circumstances creating the dispute, and as to the nature of the pre-litigation negotiation, that could make him or her the better person to make that presentation. If so, outside counsel should be mindful that the in-house lawyer may have an emotional stake in the matter bringing to mind the adage about lawyers representing themselves.

Alternatively, the litigation attorney will also be qualified to make the presentation.

a. To what degree does the client trust the outside litigating counsel? If the client had no prior relationship with litigation counsel, particularly if the lawyer was thrust upon the client by an insurance carrier, the client will likely depend on in-house counsel to confirm that the advice from the litigation counsel is worthwhile.

b. To the extent possible, the actual decision maker or makers for the party should be present. Often at mediations, a dynamic develops that does not fully translate even when people participate via Skype and even less so when information is received telephonically or electronically.

c. Key witnesses not only do not need to be at the mediation, but should not be there. The client's interests are better suited when such people are available but not subject to examination by the adversary.

Before the Mediation

a. Prepare an aggressive, adversarial brief citing the facts and law as favorably as possible to your client so long as the facts and law you rely upon are legitimate. Overstating the case can result in loss of credibility with the mediator and make him or her less effective in pushing your adversary. The strong brief also allows you to point out the weaknesses in your case to the mediator in your first private session. That can result in the mediator drawing the conclusion that your side is the reasonable one such that the arm twisting will take place in the other room.

b. Notwithstanding the invincibility stemming from your powerful brief, the client should be informed in writing of the weaknesses in its case. You don't want your client to gain an inflated sense of the strength of its position.

c. If the parties agree to exchange mediation memoranda, each party inevitably will see its opponent's submission. In that event, consider your memorandum to be part of your opening statement and ensure that the tone strikes an appropriate balance between advocating your position while at the same time signaling that you are genuinely prepared to settle. An aggressive and adversarial tone could send the wrong signal to your adversary about you intentions on settlement. For example, such a tone could unintentionally convey to your adversary that you are intractable and unwilling to consider your adversary's position, and that could have a chilling effect on expectations for settlement and put the process on the wrong footing.

d. Prepare a draft settlement agreement in advance of the mediation and send it to the other side sufficiently in advance of the mediation to allow enough time for them to consider the key terms. The draft should be a complete agreement that contains all recitals, terms and conditions- except, of course, the particulars of the settlement itself (e.g., the amount to be paid, when, to whom, etc.). It enables the parties to fully settle a dispute, walk away from the mediation with a signed settlement agreement in hand, and avoid the delay and potential disputes that drafting and negotiating a settlement agreement after the mediation can create. It also avoids calling into question the efficacy of the settlement itself if the parties reach an impasse over the terms of the settlement agreement. Note that some state courts have held that a settlement is enforceable even if the parties are later unable to agree on the terms of a formal settlement agreement, unless the settlement was conditioned on achieving such an agreement. *See*, *e.g.*, *Ketchum et al. v. Conneaut Lake Co.*, 163 A. 534, 535 (PA 1932) ("Where parties have reached an oral agreement, the fact that they intend to reduce the agreement to writing does not prevent enforcement of the oral agreement."); *Storms v. O'Malley*, 779 A.2d 548 (PA Super. 1998); *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.*, 500 N.E.2d 1 (IL 1986) ("[I]f the clear intent of the parties is that neither will be legally bound until the execution and delivery of a formal agreement, then no contract comes into existence until such execution and delivery", quoting *Chicago Title & Trust Co. v. Ceco Corp.*, 415 N.E.2d 668 (IL 1980)). The objective should be to conclude the mediation without having to tie any loose ends, such as converting a mediator's memorandum of agreement into a complete settlement agreement.

Demeanor and Conduct During Mediation

From the moment you walk into a mediation, the client, in-house counsel and litigation counsel should maintain a solution-driven attitude. Entering mediation with an aggressively adversarial attitude will likely shut down the possibility of reaching an agreement before the mediation even begins.

Given that they are in the midst of litigation, the parties are likely angry or upset with one another. This may be the first time the parties are facing each other since the occurrence that

caused the dispute at issue. However, it is important that strong emotions be checked at the door and the players act cordially and respectfully to show their willingness to truly engage in the process.

Similarly, the in-house counsel and litigation counsel should view themselves as their client's advisors during mediation, more so than advocate. While they will certainly present their client's strongest position and advocate that position to the mediator, they are ultimately there to guide and advise their client throughout the process. The goal of mediation is not to win, but to resolve the problem in the most cost-effective and business savvy manner.

Finally, the parties should conduct themselves ethically. It is never appropriate to lie about your case to obtain an advantage at mediation. You may over-emphasize your strengths and ignore your weaknesses, but never cross the line into lying about facts or circumstances.

Opening Presentation

Some parties find it most efficient to dispense with opening presentations in cases where the positions of each side are well-known to all of the players. The mediation begins in separate rooms with initial discussions with the mediator. While this may be efficient, it may not be as effective as the opportunity for the parties to sit together in a room and hear each other out.

The opening presentation at a mediation is the only chance the parties have to speak directly to one another. Too often presenters at mediation make the mistake of focusing their presentations to the attention of the mediator. However, the mediator will not make the ultimate decision. The mediator is not the party you will be facing at trial. Therefore, it is good practice to take the opportunity to speak directly to the opposing party. That said, presentations by the parties are valuable to the mediator. They amplify what she may have learned from reading the parties' mediation memoranda and can provide valuable talking points that she will need- and typically will use- in her private sessions with each party to (i) point out the weaknesses in its positions, (ii) emphasize the risks that the party faces and (iii) establish more realistic settlement expectations.

If the client has the skillset to make a compelling presentation, you should consider whether it would give the opposing side some intangible satisfaction to hear the adversary apologize or explain himself/herself. Or in a business dispute, you should consider whether a statement from business person to business person would help focus the parties on the fact that settlement is ultimately a business decision and that maintaining future business relations is of considerable importance.

Regardless of who makes the presentation, this is also an opportunity to show the other side how the players will present at trial. A strong, persuasive presentation at mediation should cause the other side to pause and consider whether he/she wants to take a chance with such a presentation in front of a jury.

LISTEN. When it's your turn to sit back and listen to your opposing side's presentation, do not concern yourself with coming up with a counter to every point made. Do not visibly react, shaking your head or rolling your eyes at statement you disagree with. Instead, lean in and actually listen to what is said. Consider the situation from your opponent's perspective and try to put yourself in his/her shoes for the moment. Also take the time to gauge your opponent's presentation skills and the effect the presentation might have on a jury at trial.

Negotiation

During the negotiations, it is the attorneys' responsibility to help the client analyze the potential risks and benefits to accepting the offer on the table or determine the appropriate initial offer to make. Counsel should help the client weed through the opposing side's opening presentation. Honestly consider the strong points on the opposing side, but also point out the weaknesses and potential responses to points made.

The Plaintiff should open the negotiations with a demand equal to its best case scenario at trial, but not more. A demand that is too high threatens to turn the opposing side off to the process. On the other hand, the Defendant should be reluctant to discuss any settlement range until the Plaintiff has made its initial demand. Any valuation of the case suggested by Defendant will likely become the starting point for the negotiations instead of a middle ground.

While it is wise to give yourself room to negotiate towards your target settlement number, it is also important to make offers and demands that have a rational relationship to the damages in the case. Being too far off-base for too long, wastes time and the openness to settlement that may have been present when mediation began.

Mediation After the Fact

Congratulations.

Following a long day of tireless negotiations, you have settled your case. Or have you? Have the parties reached a tacit agreement to resolve the case without formalizing a settlement agreement or documenting the essential terms? Did everyone walk out of mediation with a shorthand version of the settlement agreement, with a promise that counsel would later prepare a final, more detailed settlement agreement? In such cases, perhaps the congratulations should be reserved. Unless and until the parties have manifested their mutual assent to the essential terms of the settlement, the parties should consider the case still pending and active – on track toward trial.

A general agreement to resolve a case for a sum certain leaves open the possibility that the settlement can fail because of ancillary terms such as the time for payment, confidentiality, forum selection and choice of law provisions, and the like.

While each jurisdiction has its own rules and procedures for finalizing settlement agreements and dismissal of resolved cases, common law contract principles provide guidance. In general, where one party tenders additional or different terms, the new terms become a counteroffer. Unless there is an acceptance of the counteroffer, there is no meeting of the minds and no enforceable contract. Therefore, the parties should commit all essential terms to writing before leaving mediation to ensure that there is mutual assent to the final settlement agreement.

Some jurisdictions provide authority for binding the parties regarding settlement. In Washington State, Civil Rule 2A provides that no agreement regarding disputed litigation will be considered by the Court unless the agreement was made in open court on the record or there is a document signed by the parties' attorneys. The purpose of this rule is to avoid disputes and to give certainty and finality to settlements and compromises. Despite this statutory provision, on occasion, parties leave mediation with only a general agreement to compromise. Days or weeks later, as the parties work to distill the agreement into a settlement and release agreement, the settlement falls apart.

As suggested previously in this paper, circulating a proposed settlement and release agreement before mediation can precondition the Plaintiff or other adverse parties to the terms that your client considers essential before they attend mediation. Further, you should be prepared not to leave mediation until a detailed agreement has been signed by the parties or counsel. Strict adherence to the requirement of a signed written agreement before concluding mediation will prevent post-settlement disputes and provide finality to the parties.