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Winning the Mediation: A Trial Lawyer's Guide

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Lawyers often market themselves as great trial lawyers, even going so far as to promote their win/loss percentage. Yet, an estimated 97% of all cases never make it to trial[1] (and the lawyers in those cases therefore never get to show their "amazing" skills at picking a jury). A good number of those cases settle at a court-ordered mediation.[2] So, some might say that clients ought not to be looking for who is going to win the trial for them, but rather who is going to win the mediation.

Many lawyers (and clients) think that a lawyer should show up at a mediation and act like he or she would at a trial. This strategy of mediating, however, is a mistake. Mediation requires different skills than does a trial, and a lawyer with those skills can *win* the mediation. Winning a mediation does not necessarily mean settling the case. Some cases cannot or will not settle. But winning a mediation does mean getting the absolute best possible offer from the other side and enabling your client to decide whether to take that offer or go to trial. Your client may choose to reject the offer and go to trial, but it's important to know that you left no money on the table.

Who Should Serve As Mediator

The first decision a lawyer must make is *who* should be the mediator. Whether there is a panel of court-approved mediators or the parties choose to use a private mediation agency, there will be a decision of which mediator to choose. But the decision of who to choose as a mediator is very different than who you would want to try the case. Just because somebody is likely to agree with your theory of the case does not mean they will have the skills to get the best possible offer from the opposing party. So who do you choose?

First, pick somebody that the other lawyer and party will respect. You want a mediator who will have some influence with the other side. The easiest way to do this is to choose somebody on the other side's list of proposed mediators. The other party is far more likely to listen to a mediator that opposing counsel proposed than somebody you selected. You should also pick your client's brain about what the opposing party is like. Will the opposing

party most respect a grey-haired retired judge or will he or she be more comfortable with a business-like lawyer mediator? On a similar note, do not select your "pal," who you always use to mediate and who you think will favor you because you are social friends or because you throw him or her a lot of business. Once the other side finds out (and they will), they will not listen to a word the mediator says.[3]

Second, choose a mediator who will relate to your client. Note that this is not the same as choosing somebody who will agree with your client. There is a two-fold reason for this. Part of what a mediator will do is look at each side's chances of prevailing, including what kind of presentation the mediator thinks your client will make to the jury. You want somebody to whom your client can talk and open up to, so that the mediator will like and relate to your client. Similarly, when the time comes for the mediator to start pushing to get the case settled, you want somebody to whom your client will listen.

For example, some mediators are schmoozers. While the other side is discussing an offer among themselves, the mediator will fill your client's waiting time with small talk and war stories. You need to know if your client will like, or be irritated by, a chatty mediator. Similarly, if you represent a plaintiff in a sexual harassment or discrimination case, you will probably want a more sensitive, rather than a brash, or pushy, or clinical mediator. In other words, fit the mediator to your client.

Third, select a mediator that has some knowledge of the area of law involved. One of the most useless mediations I ever attended involved a Lanham Act claim. The mediator had absolutely no idea what the Lanham Act was about and we spent hours just trying (unsuccessfully) to explain it to him. He never got it and we wasted a day. This does not mean that your mediator needs to be an expert in the area of law. He or she most certainly does not. But the mediator should have a frame of reference for the case and if she or he knows nothing about the area of law, it will be a waste of time.

Fourth, select of mediator with a style that fits the case. Some mediators are more evaluative: they like to predict who will win and how much in damages that party will get. Others are more collaborative: they look at every mediation as a business deal that needs to be completed and who is right or wrong doesn't matter. Many mediators combine the two styles.

In some cases, an evaluation of the case will be a complete waste of time. Everybody is locked into their positions and the mediator's two cents will be ignored (and may well

harden positions). In other cases, a mediator's view will be welcomed. You need to understand which kind of mediator best serves your case and get the kind you need.

Feel free to call prospective mediators and ask about their style. Also, e-mail colleagues and find out whatever you can about a proposed mediator.

When Should You Mediate

Back in the "olden days," when I first started to practice law, settlement conferences always were held right before trial. But you have more input about when to hold a mediation.

I am a firm believer in *early* mediation — either before discovery or after a minimal amount of discovery. Early mediation has the tremendous benefit that neither side has spent much in attorneys' fees, and there are more open issues (creating more risk for all parties).

There are certainly cases that cannot settle early, because discovery is necessary. That doesn't mean that an early mediation was a waste of time. The parties get their offers and demands on the table at an early stage and issues are clarified. A good mediator will then give the parties a period of time to do specified discovery and then have them return for a follow-up mediation.

How to Prepare Your Client

Client preparation is as essential for mediation as it is for trial. If your client has never been through a mediation (and even if he or she has), you should assume (and you will most likely have assumed correctly) that your client knows absolutely nothing about the process. Most clients think the mediator will decide who is right and who is wrong. Most clients are afraid that they will be required to give some kind of presentation and will have to accept what the mediator suggests as a good settlement. Most clients believe that if you do not correct every misstatement that the other lawyer has made in a joint caucus, you have waived rights.

Walk your client through the mediation process ahead of time. Explain that the mediator does not care who is right or who is wrong, but cares only about settling the case. Prep your client to be polite to the opposing party. You may even want to prep your defendant client to give an "apology" to the plaintiff at the joint caucus; by "apology," I mean have your client say directly to the plaintiff something innocuous like "I'm really sorry this situation

happened." Statements like this soften the opposing party and often move that party towards your settlement position.

I always tell my client that when the mediator presents a settlement offer — no matter how big or how small — the client should not say a word and show no emotion. I explain that we will ask the mediator to leave the room and will talk among ourselves and then respond to the mediator.

Do not push your client to decide on a bottom line before the mediation. It is a waste of time, because it will not really be the bottom line; mediation is a process to get to the bottom line. There is no reason to even think about the bottom line until the parties are close. Instead, make sure your client has an opening offer before the mediation, and have your client start to think about the range of money he or she would feel comfortable giving or taking.

How Should The Mediation Be Conducted

Most lawyers mistakenly believe that the mediator controls how the mediation is conducted. That is only true, however, because most lawyers allow the mediator to do so. There is no reason a lawyer cannot pull the mediator aside outside the presence of his or her client and suggest to the mediator how to proceed.

For example, there is often a question of whether a joint caucus should be held, and if so, what will the agenda be for that caucus. In some cases, a joint caucus is helpful: important facts can be agreed upon and clients can learn details about the other side's version of the case. Most of the time, however, joint caucuses do not help the case towards settlement. Counsel do "mini openings" in which they argue about what a great case they have, attack the credibility and integrity of the opposing party and counsel, and in general, act "tough." There are cases where this is effective but they are few and far between. Usually, this kind of conduct just incenses the other party, and opposing counsel has to waste time "correcting" all the misstatements made by the first lawyer.

Instead, show how tough you are in the mediation brief. This is your opportunity to go through the facts that you believe will result in a verdict in your favor and to analyze the law, pointing out cases that support your position. Your mediation brief should be short (no more than 10 pages) and attach the 5 or 10 best exhibits or excerpts of deposition testimony. If the exhibits are long, *highlight* the sections that help you. It is your job to

make it easy for the mediator to understand your side of the case (and to avoid making the mediator slog through dozens of unnecessary pages of meaningless documents).

Once you have hammered the other side in the brief, you can then turn on the charm at the mediation. If the mediator insists on a joint caucus with an opening statement, the opening should be short, non-confrontational and calm. Briefly point out the three best reasons why you will win, and note that you are here not to argue about who is right or wrong but to try to resolve the case on a business-like basis. This gives to the opposing counsel and party an impression of strength, but also lets them know that you are not unreasonable.

You can also control the mediation by making the first offer, whether you are plaintiff or defendant. Making the first offer gives you power over what terms will be discussed, especially if more than just money is involved, and the parameters of the negotiation.

Do not allow the mediator to skip a lunch or dinner break. Mediators like to work straight through because the longer you go, and the hungrier you are, the more likely you are to cave in. So insist on the meal breaks. It does not have to be a long one, but do not allow the mediator to take advantage of you in a weakened state.

When Should The Mediation Be Concluded

If you have gone seven or eight hours and you do not see the kind of progress that leads you to believe that a settlement will be reached, then say thank you and leave.[4] Mediators love mediations that go on long into the evening because counsel and their clients tire out and are far more willing to cave in on an issue or two just to get out of there. This is the oldest mediator trick in the book!

Do not allow this. If you have not made tremendous progress in seven or eight hours, then it is time to give up on the mediation and leave. Another mediation can always be set up at a later date.

On the other hand, if it is 7:00 p.m. and you have made some progress but are just at an impasse, then ask the mediator to make a "mediator's proposal." The mediator will then prepare a written proposal that either side must either accept or reject. If either party accepts, that party finds out what the other side said. If either party rejects the proposal, that party will not find out how the other party responded. If it is accepted by both, you have a settlement. Many, many cases settle through mediator's proposals.

If you follow these rules, you will begin to learn how to win a mediation and that is a skill that today's clients need more than ever.

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[1] 5/22/04 U.S. Dept of Justice, Office of Justice Programs, Bureau of Justice Statistics, Summary of Civil Justice Round Table Discussion.

[2] Nowadays, most courts require the parties to engage in some form of mediation. *See* Southern District of Florida, Local Rule 16.2.D; Southern District of Illinois, Local Rule 16.3; Central District of California, Local Rule 16–15.1; Eastern District of Pennsylvania, Local Rule 53.3; Middle District of Tennessee, Local Rule 16.02(c); Northern District of California, Local Rule 16.3.

[3] Moreover, if the mediator really were the kind of person who would favor a friend, you run the risk that the other attorney has an even closer relationship with the mediator, or sends more business his or her way.

[4] This rule applies only if the mediator is a private mediator. If the mediator is your judge in the case or another active judge on the court, you cannot simply walk out. But nothing prevents you from saying: "Your honor, I am getting extremely tired as is my client. We're at the point that I don't think I can be as effective as I should be to protect my client's interests and I suggest that we reconvene at a later date."