



Sotomayor Law
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A
Newsletter
on
Dispute
Resolution

Mediation Matters

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Business Mediation Tools

Practical Tools for Getting Results in Business Mediation

Mediation is an informal business meeting that is focused on negotiating a mutually satisfactory solution to a dispute. The parties control the outcome and avoid the imposition of a result by a judge or jury who do not have the same interest in creative solutions as the parties do.

The parties and their lawyers have the best chance of ending the dispute on their own. If direct negotiations fail, or escalate into unproductive arguments, it's time to bring in a skillful mediator. The mediator's job is to patiently explore all involved parties' interests, including their lawyers' interests, and assist in developing solutions that will be in everyone's best interests.

Here are some tools for attorneys to use to get the best results for their clients, and themselves, in a business mediation.

1. Choose the Right Mediator

You need a business mediator you can trust to get the job done. Maybe you have a list of go-to mediators. Maybe you have mediated cases yourself. The most important qualities a mediator brings to the table are **determination, trustworthiness, patience, creativity** and **experience**. Who will you hire? You might ask your colleagues for referrals; you might hire the person who helped you successfully settle your last case; you might do an internet search for "mediator" or "arbitrator" and come up with a new list of possible mediators for your case.

Regardless of how you come up with your list, think about the factors that have led you to successful business dispute resolutions in the past, **as well as** the factors that have frustrated or disappointed you. The mediator you choose must:

- Be prepared
- Have the ability to develop rapport with all participants
- Roll up her sleeves and work tenaciously
- Bring a level of experience that the parties and counsel respect

- Be able to develop a level of trust to elicit honest communication

2. Prepare, Prepare, PREPARE

Preparing for business mediation is probably the most important tool for achieving a desirable outcome. Negotiations have become more sophisticated, and full preparation will go a long way in making the best use of the time spent in the proceeding

A. Before the mediation, it is valuable to connect with the mediator to discuss:

- Tailoring the mediation process to your clients' dispute
- Special issues or problems
- Who the participants will be (very important)
- The overall climate of the case and relations between the parties and counsel
- The potential value of communicating with opposing counsel

B. Prepare your client on:

What to expect at this mediation (even if your client is sophisticated and experienced in business mediation)

- The strategies you might use
- The nature of the process (which you might develop with the mediator and opposing counsel)
- All of the facts, and your assessment of the case
- Everything you can determine about the client's interests, as well as what the client needs in settlement versus what the client wants in settlement. Understand the reasons behind the client's needs and wants.

C. Prepare yourself and your client on:

- Damages and other relief sought. If you are not prepared to discuss the details and bases of the relief that is sought, a ton of time at the mediation will be wasted.
- Legal positions. The other side usually needs to know why you think you're going to win. That's one of the many reasons the trial lawyer must attend the mediation. Regardless of its outcome,

the mediation process is an opportunity for everybody to gain valuable insights as well as preview the trial and some of the key players.

- Strengths and weaknesses of your case
- Your realistic evaluation of the potentially recoverable damages and exposure
- Alternative solutions
- Risks and costs – Preparing an estimated budget to litigate through trial (or appeal) is critical and potentially eye-opening for business clients.
- The value of defusing emotions in advance. If you and your client are prepared for posturing and self-righteousness from the other side, you both keep your cool and focus on solutions that will get you what you want or need.
- The importance of having the right client representative present. Nothing short circuits a business mediation quite so quickly as showing up with either no representative ("he's available by phone") or a warm body who has no authority to change his principal's settlement position. That approach quickly cements an atmosphere of mistrust, and that will prolong the path toward settlement.

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3. Know Your Case

Following the recommendations above will have a deep impact at the mediation. Lawyers who know their cases create very strong impressions that they are sincere and knowledgeable about the facts and the law. They are ready for anything. They are formidable.

4. Submit a Useful Brief

A good mediation brief will educate the mediator about the facts, legal issues, relief sought, case status, and previous settlement negotiations, if any. The mediation brief does not have to be lengthy and formal, but one that succinctly clarifies the facts and issues (both disputed and undisputed). Using a brief that is exchanged among counsel will save a lot of time at the hearing if both sides can absorb their opponents' position in advance. You can always send a confidential cover letter to the mediator that conveys private information and strategic interests.

A good brief helps the mediator prepare in advance and customize the mediation process to the case at hand. In addition, a financial/damage list or spreadsheet will go a long way toward preparing yourself and the mediator, so you don't waste time figuring it out when you're already there.

5. Consider the Messages You Want to Convey

Think about your and your client's goals at the mediation. Remember – You can catch more flies with honey than with vinegar. Think about how you want to present yourself and your client to the other side in order to achieve your goals at the mediation. Coach an inexperienced client on what to wear and how to behave. Consider the question of whether your client should speak. This can be a very powerful tool in the right case.

Before the mediation, consider working with your opponent to calculate and explain damages and other relief sought. If the attorneys and mediator are all on the same page about the basic amount in controversy, and the issues that call certain elements of claimed damages into question, everyone will be better prepared to negotiate.

6. Enlist the Mediator in Your Negotiation Strategy

Keep an open mind and consider mediation techniques you might not ordinarily support. For example, if you don't like joint sessions as a rule, keep in mind whether your and your client's interests might better be served if given the chance to speak informally with the other side.

Work with the mediator in crafting offers and counteroffers. A good mediator will discern any unspoken messages contained in an offer, and you can count on her to explain her interpretation of the message. Share critical information – Saving it for trial will not achieve a settlement that reflects the value of withheld information. And why should it, if your opponent doesn't know it exists? But, you don't have to show your hand up front; pace your valuable disclosures.

Remain flexible. While you will have considered and discussed with your client the best and worst alternatives to a negotiated agreement before you even arrive at the mediation, you may have to reevaluate. Partner with the mediator to convey messages to keep the process alive, and that often includes messages between you and your client! You should define – and redefine – what a “win” looks like to your client ... and to you.

7. And Finally ...

I cannot overstate the value of simple respect and politeness in mediation. Polite behavior and a willingness to listen to your opponent break down enormous obstacles in the first moments of mediation. The result – An incredibly efficient process in which all participants can “win” in mediation.

Mediation Clients

Do arbitrators and mediators have clients?

In the context of business mediation, I am often asked, “Who do you think are your clients?” This question cuts to the heart of competing and ethically challenging interests in a business mediation.

Lawyers in general face the potential conflict between their own monetary interests and their clients' interests in having their problem fixed and settled as quickly and inexpensively as possible. They want repeat business from their clients, so they are sure to do what it takes to keep them happy. Mediation lawyers question whether arbitrators and mediators similarly feel beholden to those lawyers who, hopefully, will hire them again and again for business dispute resolution.

It is easy to argue that mediators would take advantage of their neutral role to use mediation techniques to secure future referrals from the mediation lawyers. Many arbitrators and mediators themselves, not just the mediation lawyers, thus contend that the mediators' “clients” really are the mediation lawyers, as distinct from the parties, who are the mediation lawyers' clients.

I have to say that to some extent, I agree that the attorneys are my “clients” because I do want repeat business from happy “clients”. However, I also remember that the mediation lawyers come to me because they trust that I will be fair and impartial with both sides.

So, as a colleague recently put it, the mediator's “client” is in fact the mediation process itself. Arbitrators and mediators should be trusted to ensure the fairness of the process so the parties can achieve a business dispute resolution that they control themselves.

Early Mediation

The lawyers who practice in California's civil courts are already seeing the substantial delays that have resulted from budget cuts in the court system. Parties and lawyers need to take a closer look at the advantages of mediation early in the life of a case.

Most clients think that filing a lawsuit is a last resort, and that they have exhausted all efforts to resolve a conflict by that time. It's no small change to fork over \$435 to file a lawsuit in state court, or \$435 to answer one, for that matter. However, filing a lawsuit can be a valuable first step in the next phase of resolving your conflict.

How can this be? By the time the dispute has developed into litigation, the matter now reflects financial investment as well as risk of loss. In addition, an entirely new set of deadlines starts to affect your case, and many, often expensive, actions must be taken to preserve your rights in court. With so much at stake, and with the delays and risks that become apparent as the case stalls in an overburdened court system, parties and counsel need to look at every possible option to achieving a desirable outcome.

We tend to look to our traditionally accessible court system as an easy step to resolving disputes. We believe that putting the dispute in the hands of a judge or a jury, as in “having my day in court,” will objectify the result. We never believe that we could possibly be found “in the wrong” or that we would not prevail once the trier of fact saw our side of the story. But, once the litigation gets rolling, things have a way of becoming a lot less clear.

Why not look at a solution before the case takes on gigantic proportions? Consider limited initial discovery to get the basic information you might not already have, followed by a mediation that will explore the possibility – indeed, likelihood – that the case can be settled and put to bed right away. Or, perhaps, the mediation could be used to set up phases in which issues can be resolved little by little, step by step.

The value of bringing the decision-makers face to face cannot be overstated. Confronting the hard issues early in the case and looking at the potential for wasting financial and emotional resources in the pursuit of litigation has a way of motivating the parties to find a solution with the help of a skilled neutral. This will have a highly valuable impact on everybody's “bottom line,” and a quick and early settlement will be a refreshing experience.