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Mediation requires different approach

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Mediation of civil disputes is here to stay. Effective use of the mediation process can resolve disputes not only efficiently, but also bring greater satisfaction to the client. Successful representation of a client in mediation often requires a different approach than that of a litigator. This article will help practitioners to better understand "mediation advocacy" and prepare themselves and their clients for a positive outcome.

Much of the success in mediation is affected by what the advocate does in the premediation and preparation phases. In step one of the premediation process, the attorney and client should decide what they want to accomplish in the mediation — their strategy. Planning for mediation is much the same as planning for a direct negotiation, but the attorney should also carefully plan how to incorporate the mediator into the strategy. This is especially important when direct negotiations have not been successful in the past because the mediator can play a significant role in breaking through the impasse. The mediation strategy shapes how the mediation will progress. Settlement may not be the goal in the first session or even a desired outcome of the mediation. The attorney and client may have other, more immediate goals for mediation such as refining the issues, establishing a more streamlined discovery schedule or even using the first sessions of the mediation to negotiate the process.

The second step in the premediation phase involves selecting the right mediator. A mediator may be selected for expertise on the business issues, the legal issues or knowledge of other technical aspects of the case. The mediator's style should also be considered. A mediator may take a facilitative approach, an evaluative approach or shift between the two styles during the mediation. Other considerations include the personality of the mediator, availability and the location of the mediator. For example, the case might benefit from using a mediator from out-of-town to facilitate the mediation — someone who does not know the parties, attorney or the culture of the environment surrounding the case. Selecting the right mediator is critical to the successful outcome of the mediation.

In the third step, the attorney and client should design the right process for the mediation. The attorney should discuss with the opposing attorney the most effective way to communicate expectations and needs regarding the process to the mediator. Other people may be involved in the process design besides the parties and their attorneys, for example, case managers from an ADR provider can offer insight into various alternative process designs. Additionally, the attorney and client must decide who should attend the mediation and the role or roles for each attendee. The mediator can often assist in bringing the right people to the mediation.

The fourth and final step in the premediation process is the premediation contact with the mediator. If a mediator does not initiate contact, the attorney must make this happen. A discussion with the mediator allows the attorney to clarify procedural issues, ensure proper preparation and begin to develop some rapport. The type of premediation contact should be driven by the complexity of the case, the parties and the needs of the attorney and the mediator. Administrative issues are confirmed, such as date, time and location of the mediation, along with the due date for premediation submissions. The mediator may contact and conference with all parties at the same time or the mediator may digest the premediation submissions and then initiate individual calls to both attorneys. The mediator should not focus on the merits of the case, but instead inquire about legal and nonlegal factors that may influence the negotiation.

Once the premediation phase is complete, the preparation phase begins. Here, the attorney and client refine their strategy. There are a host of questions to be answered during preparation. What are the goals for mediation and are they realistic? What are the goals of the opposing attorney? What data is needed to bargain well and make a settlement decision? What are my client's best options if a settlement is not reached? There are decisions to be made relating to the role of the mediator as well. What is the best way to educate the mediator about the case? Would premediation submissions, the opening presentation or private caucuses provide the best vehicle to present information to the mediator? How can the mediator help to overcome obstacles already encountered in direct negotiations with the other side? In addition, technical decisions must be made relating to how to convey key points using illustrations, photographs or computer-aided technology and whether the mediation environment will support this.

In the preparation phase, the attorney should make premediation submissions to the mediator. These submissions are driven by and support the overall strategy for the case. It is strongly advised that the attorney have their client read and approve their premediation submissions. It is also strongly advised that the client read the submissions from the opposing attorney. Both attorneys should discuss among themselves the length and form for submissions and what documents will be included so as to avoid duplication for the mediator. Further, there must be agreement between attorneys regarding whether these submissions will be shared, confidential or a combination of the two. The client may have information that the other side needs in order to settle the case. This information can be shared with the other side or remain confidential to the mediator only. Key information that the mediator should know includes: The

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history of the dispute, the important players, the points of agreement and disagreement, the nonlegal concerns, the barriers to direct negotiation and the information that is missing from the other side that would help to settle the case. Complete, organized and labeled submissions to the mediator should be made 10 days prior to the mediation to allow the mediator time to read and digest the material.

The final, indispensable task in the preparation phase is preparing the client for the mediation process. Mediation is negotiation, but it is different from face-to-face direct bargaining and clients must be prepared for this type of negotiation. Parties in mediation will spend most of their time in isolated caucuses, interacting only with the mediator. Clients should understand how the caucus process works and understand their role in the mediation. If the client will be speaking in the opening session, the client must be prepared and coached regarding their tone, how to respond to unsettling remarks or reactions from the other side and how to interact with the mediator and the other side. The client should also be informed about confidentiality rules and whether any exceptions apply.

Mediation is facilitated negotiation and the client must be prepared to negotiate. In most disputes, the legal and economic interests of the parties are of paramount concern. While the attorney must focus on these matters in litigation, a successful mediation strategy will also address the client's nonmonetary concerns such as emotional needs, personal interests and professional interests. Lastly, the attorney should help their client identify their needs and their wants, the best alternative to a negotiated settlement and risks associated with going to trial.