

Mediation Preparation

Amy L. Glaser, Esq.

May 2008

Remember What You Already Know

Mediation is an opportunity to negotiate claims with the advantage of a third-party neutral to provide assistance. As a consumer of mediation services you can maximize the efficiency of the mediation process by incorporating several basic negotiation principles into your mediation plan; professionals are often well-versed in making mediation preparations but there is a benefit to taking a moment to revisit some fundamental negotiation principles. This brief article addresses preparation basics, reluctant participants and considerations related to making a first offer. Periodically this newsletter will address some of the negotiation principles that may help you make your mediations as productive as possible.

Start at the Beginning

Prepare for mediation in the same way you would any other negotiation. Begin with a complete, practical assessment of all the information you have available to you about the claim, including a reasonable estimate of what additional information you anticipate may develop in the future.

Discuss with your client the broad range of potential outcomes, ranging from the possible result if all elements of the claim went their way to the consequences if the opposite were true. Raise the most likely "in-between" possibilities; as a practical matter most mediated resolutions lie somewhere between the best and worst case scenarios. Take the time to run possible financial options with your client and work with them to generate non-monetary options if applicable. Identify prospective deal-breakers and the potential alternatives, good and bad, to a mediated resolution. Based on the analysis of the claim, discuss and confirm suitable settlement authority with your client. Know your range and, to the best of your information and ability, anticipate your opponent's range.

A discussion concerning the potential of a less than ideal outcome may not thrill you or your client, but they will be more prepared to discuss realistic alternatives during the course of the mediation if they are not a surprise.

Prior to the mediation confirm with your client that circumstances can change as a result of additional information obtained or issues raised during the mediation, and this can necessitate a reassessment of your original plans.

Reluctant Participant(s)

If you and your client are mediating because you are required to do so and your client is less than enthusiastic, convey to them that there is no obligation to resolve a claim during the mediation

process. When a client understands that they will not be required to resolve their claim at a mediation it can take some of the pressure off, helping them put aside their adversarial mindset and allow them to participate with a more cooperative attitude.

Take the opportunity to discuss with your client the potential benefits of a mediated resolution. Encourage them to look at the broader landscape of resolution alternatives and remind them that working cooperatively with the opposing party will not require them to sacrifice those things most important to them.

Finally, remind your client (and yourself) that the preparation phase itself can be a valuable tool in deciding whether resolving the case at mediation is appropriate or whether proceeding with litigation is your client's best course of action.

Making a First Offer

If there has been no previous discussion concerning settlement prior to the mediation, one consideration is whether you and your client will make the first offer. There is an almost natural reluctance to avoid making the first move. Thorough analysis of your case can reduce the risks associated with taking the first step, and doing so may even bring some advantages. For example, you may have the opportunity to suggest the bargaining zone, or essentially set the parameters of the discussion. Depending on the particular circumstances, the side making the first offer arguably may have a little bit more control over characterizing the facts or issues, setting the method of valuation, focusing the discussion on issues important to their client, etc. Choosing to make a first offer that is rationally supported (or ideally, well supported) by the current information may be an opportunity to highlight the reasonableness of your view of the issues including your valuation of the claim and can invite reciprocal bargaining from an otherwise unmoving opponent.

The real risk is not usually in making the first offer, it is in making the first offer without too little information or inadequate evaluation of the information you do have.

Final Thoughts

Even if you have engaged in settlement negotiations prior to the mediation, revisiting these negotiation principles can still have a positive impact on your mediation. A mediation conducted by a neutral third party gives participants an opportunity to reset the tone of prior discussions. While it may be unrealistic or even unwise to put all differences aside, an opportunity to begin again with a fresh approach at mediation may yield a reasonable resolution to the issues at hand and, at a minimum, will help you and your client determine a future course of action.