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## ALTERNATIVE DISPUTE RESOLUTION

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### Get Ready for Mediation: Your Client Deserves It

A lawyer must do several things to mentally prepare before showing up for an effective mediation

**M**ediation is still a relatively new process in the legal system. As a mediator, I find the increasing number of articles on mediation encouraging. The articles are typically from attorneys, explaining the process and advantages from a participant's viewpoint. This article discusses mediation from the mediator's perspective, and explains how an attorney can properly prepare himself and his client for mediation.

Starting with the obvious, mediation is not a trial. Not so obvious to many is the fact that mediation is not arbitration. Prior to mediation, instead of a statement of the case framed for mediation, I have on occasion received a form arbitration statement from parties. Often, during the communications leading up to the first mediation session,

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an attorney will still ask me, "Is it binding mediation?" After suppressing the various retorts I've internalized over the years, I give a simple explanation that a lawyer unfamiliar with the process understands: "It's not arbitration. It's essentially a settlement conference managed by a peer instead of a judge. It's only binding if you sign a settlement agreement. So, yes, hopefully it is binding." Mediation is much more than that. But this is the first step toward getting the lawyer to stop thinking purely like a client's advocate in pursuit of judgment or vindication, and to start thinking like the client's counselor in pursuit of resolution. That mental transition will greatly increase the chances of successful mediation. At this relatively early stage of mediation in the courts, the burden of facilitating that transition unfortunately remains on the mediator who must accomplish it using that old college stand-by — cramming.

Mediation still frequently begins with the mediator making his opening pitch, and the lawyers and clients wondering when it will end so they can start arguing. While each lawyer mentally hones his opening statement into a real zinger (or first starts to think about what he will actually say in this case), he faintly hears in the distance the media-

tor spouting phrases like, "an opportunity for the parties to control their own destiny and shape a resolution beyond what a judge or jury will be permitted to do," "eliminate the risks of an unknown outcome," "a chance to avoid being at the mercy of a decision maker you don't know," "a substantial savings of time, energy and money which otherwise will be sucked out of the client if the litigation goes toward trial," etc.

Take it from a mediator: if the lawyers and their clients were already in a mediating frame of mind, the mediator would gladly be less pedagogical. But the lawyers and clients most frequently are sitting there ready to try the case. Despite my having sent an explanatory letter and held the initial teleconference, several times parties have brought witnesses or experts to testify, or have called to ask for an adjournment because those persons are not available. By using the above phrases, the mediator is seeking to convert the players' mind-set to suit the process. But what does the lawyer need to do? The lawyer must do several things to mentally prepare before showing up for an effective mediation.

**Determine what the client needs, not to "win" the argument, but to resolve the dispute.** Certainly, the lawyer should develop the facts, to the extent they are known at the early stage when mediation usually occurs, and should clarify the legal issues. However, the lawyer needs to go

beyond that or, perhaps, retreat from it. What is the client's overall objective or primary need? If the client is the plaintiff, does he need to get a paper judgment for a sum certain or actually obtain funds to cover costs advanced or avoid defaulting on obligations to third parties? Is the ultimate victory or a quick resolution more beneficial to the client? Are there nonmonetary aspects that would be attractive to the client (e.g., a letter withdrawing a potentially defamatory statement, a consent order for injunction, a letter of recommendation, an apology)? Out of the multiple legal arguments the lawyer has crafted, what is at the core of the client's case?

**Develop thoughts about what the adversary may need to resolve the dispute.** Mediation turns the corner when each party starts to accept that the other has defensible legal positions or, even if that may not be the case, that the other has real needs with or without legal merit for which it is willing to fight. When the parties accept this, they start to develop demands and offers that "tempt" the other side, most often leading to a resolution. Yet, it is surprising how frequently neither side has given this a thought before showing up. Much of the session is then spent with the mediator shuttling back and forth bringing each side around on this notion. To be ready to mediate effectively, the lawyer needs to anticipate and to prepare for that stage. Look at the above questions from the defendant's side. How much money does the plaintiff need to cover its obligations and is your client in a position to make it available? If your client has a cash shortage, is there a way for it to propose a payment schedule? Are there nonmonetary aspects your client can offer? Can your client accommodate in any way the core needs of the adversary?

**Determine what basic informa-**

**tion you will need, and that you can produce, before mediating.** Part of the pre-mediation process is frequently the exchange of some basic discovery. No, that typically does not include a three-day deposition of the individual plaintiff or the uninvolved president of the corporate defendant. It is more in line with the scope of Federal Rule 26 initial disclosures. Before you participate in the organizational teleconference, think about the basic material information that you need, which the adversary can produce within a reasonably short period of time. Also, think about what your adversary will likely need that your client can produce within that same time frame. Be prepared to reasonably request information and to commit to producing reasonably requested information, usually within a couple of weeks after the teleconference.

**Prepare the client for participation in mediation.** Think about how many hours you spend with a client, preparing the client for a deposition or trial testimony. You want that client to be as prepared as possible for that process, to anticipate questions and respond on direct or cross examination honestly but as favorably as possible. If you prepare a client that carefully and thoroughly for mediation, you greatly increase the chance that the client might not have to be subjected to deposition or trial. Determine who has actual settlement authority and prepare that person. Go over the above three processes. What do you need? What is your adversary likely to need? What information do you need to feel comfortable in making proposals for resolution? What information do you have to educate the adversary so that it will feel comfortable with the proposals we make? Who will make the presentation if there is a joint session? Will the client be caught off guard if the

mediator asks questions?

**Develop your goals and some proposals before you show up.** This is really the key and is facilitated by the above steps. But you have to be realistic. That is not to say that you should establish your bottom line before you show up; you cannot establish the bottom line before you go through the mediation process. It also does not mean that you should necessarily share your opinion of the bottom line with your client. Often, that is an important role for the mediator, to be the third party that tells the client the bad news. The lawyer's job during mediation necessarily includes convincing the client that it may have to concede more than the client had intended. Be prepared to recognize when to adopt a mediator's position. Also, recognize that the mediator does not carry the weight of the judge who is going to send you to trial if you do not settle. The lawyer should be prepared to take a more forceful role with the client than when participating in a pretrial settlement conference. The goal is to resolve the case well in advance of that stage, for the benefit of the client. If a lawyer does not find himself discussing the merits frankly with his client during mediation, he is likely not doing his job and doing a disservice for the client.

**Representing a client in mediation is a skill to be learned and developed just like any other legal skill.** We had to study property, criminal law, evidence, and the rest to develop our understanding of the law, and we had to study trial techniques to try cases. That education is a continuing process. Mediation is no different. It's a part of the practice, so learn about it and learn to be good at it. Representing a client in mediation is a serious matter. It may be your opportunity to provide the client with the best service possible. ■