Thought Leadership Discussion

Over Prepare, Then Go with the Flow: Legal Counsel Best Practices in Premediation Preparation

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Prior to mediations involving complex business disputes, the parties and legal counsel typically exchange offers and counteroffers—often focused solely on the dollar amount involved. The parties and legal counsel may also exchange mediation briefs addressing substantive legal issues. However, legal counsel—and consulting experts—often devote little or no time to understanding the client's interests and goals, evaluating the case strengths and weaknesses, developing a budget, or assessing settlement options. This discussion provides a practical guide to preparing for mediation and summarizes the best practices for conducting a premediation assessment in order to maximize the likelihood of a successful dispute resolution.

Introduction

As Benjamin Franklin famously said, "By failing to prepare, you are preparing to fail." This statement is true of many things in life, including tort and contract dispute mediations.

A study conducted by the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality found that premediation preparation is critical to a mediation's success.[1] Yet all too often, counsel and disputing parties show up to a mediation without sufficiently evaluating their case or discussing their goals. Inadequate preparation is a disservice to the client.[2]

Not only can a lack of preparation result in costs spiraling out of control, it can also jeopardize what may be the best opportunity to resolve the dispute. By performing a premediation case assessment with the client, legal counsel can (1) identify the client's goals for the mediation and (2) formulate a plan to achieve them. Indeed, taking control of the process can improve counsel's likelihood of determining the mediation's outcome and engaging in productive settlement negotiations.

This discussion identifies best practices for:

1. conducting a premediation assessment, the goal of which is to invest time and energy prior to the mediation to understand the client's expectations, business interests, and needs;
2. identifying the client's goals for the mediation; and
3. developing a strategic plan to meet those objectives.

When executed properly, a premediation assessment enhances the efficiency and transparency of the mediation process. And, it can lead to a cost-effective, business-driven solution not otherwise available in litigation.

Identify the Client's Interests, Needs, and Goals

Uncovering and understanding the client's goals are the first steps in counsel's premediation assessment.

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And, these steps serve as the foundation for the entire process. Developing a thorough understanding of the client's objectives for the mediation enables counsel to structure a plan to meet those goals and ensure that the client's interests are taken into account throughout the process.

When identifying and assessing goals, counsel should focus on how the client's needs and interests may impact settlement negotiations. This will allow counsel to refine the settlement options and positions so as to align with the client's objectives.

Clients involved in tort or contract disputes sometimes mask their needs and interests. This is because either (1) they do not know their true concerns or (2) they are driven by emotion, such as the desire to vindicate a position or punish the other side. Thus, counsel's tasks are to explore and uncover the client's true needs and interests. Counsel can accomplish this goal by asking open-ended questions about the following:

1. Genesis of the dispute
2. Client's goals
3. Reasons behind those goals

Once counsel has identified the client's needs and interests, counsel should prioritize these needs/interests with the client as the litigation team begins considering settlement positions. During the mediation process, the client may need to reexamine his or her needs and interests and recalibrate his or her position to reach a satisfactory outcome. Counsel's role includes the following:

1. Identifying which goals must be satisfied to reach a resolution
2. Formulating alternative settlement paths that align with those goals

Thoroughly Assess the Evidence and the Law

Counsel should prepare for a mediation as he or she would for trial. Before the mediation, counsel should assess the who, what, when, why, and how of the case and determine if there are any information gaps.

A full understanding of the relevant facts and applicable law is necessary for the client to make an informed decision when considering the range of settlement options. A comprehensive grasp of the facts also enables counsel to get ahead of the mediation process by evaluating the relative risks of the case to determine whether a mediated settlement is preferable to continued litigation.

Just like at trial, mastering the facts and the law is important to the outcome of a mediation. However, counsel's focus in preparing for a mediation should be on analyzing the information likely to have the greatest impact on settlement, as opposed to analyzing the material that a judge or jury would need to understand for trial.

To understand the client's version of the facts, it is incumbent upon counsel to conduct interviews, review relevant documentation, and gather additional documentary support.

As part of the premediation assessment, counsel should identify the key witnesses in the dispute, consider the dynamics of their relationships, collect critical documents from them, and consider which categories of documents (both favorable and unfavorable) require further analysis and review. To limit the risk of surprises at the mediation, counsel and the client should determine in advance if there are gaps in the facts and, if so, formulate a plan to obtain any missing information.

Finally, counsel should research all relevant legal issues in order to evaluate the strengths and weaknesses of the known facts.

By coming to the mediation with a comprehensive understanding of the facts and the law, counsel can stay in front of the other side and build credibility with the mediator. More importantly, counsel can communicate key evidence and legal arguments to the mediator who, in turn, can educate the other side about the important weaknesses in its case and/or the relative strengths of the client's position.

Evaluate the Strengths and Weaknesses of the Case

After marshalling the key evidence and law, counsel's next step is to determine the case merits by assessing its strengths and weaknesses. The evaluation should "[b]reak the case down into a series of issues rather than a simple question of value; this will [ ] encourage analysis that is less affected by wishes and emotions."[3]

It is important that counsel not only outline the strengths of the case, but also focus on its

weaknesses—by considering the opposing parties' perspective. What are they likely to argue? What flaws will they see in the client's theory? What bad facts will they focus on? A premediation assessment that contemplates both the strengths and weaknesses of the case allows the client to develop a realistic bargaining zone for the mediation.

The candid assessment also builds credibility with the mediator. This is because counsel is able to demonstrate to the mediator that both counsel and the client have considered the weaknesses in the case in arriving at the settlement position.

Further, reviewing the case strengths and weaknesses allows the client to conduct an accurate cost-benefit analysis, comparing what may be achieved in settlement with the legal and business consequences of continued litigation to arrive at a realistic settlement range.

In preparing for a mediation, it is important that counsel controls the client's expectations by:

1. recognizing and discarding counsel's advocacy bias and
2. engaging in a realistic assessment of the case from the perspective of a disinterested neutral.

Failing to do so results in "optimistic overconfidence," which is passed on to the client, who becomes emboldened and overestimates the value of its case and is thus less likely to compromise.[4]

Finally, counsel should advise the client that the aim of the mediation is not to win the case, but rather to problem solve. Mediation necessarily involves compromise, which requires collaboration between all participants regardless of the strengths and weaknesses of the case.

Develop a Comprehensive Budget

A budget is integral to any premediation assessment. And, counsel should devote sufficient time to preparing a comprehensive and detailed budget prior to a mediation. A well-designed litigation budget can clarify the outlook on a case and set client expectations regarding how the case will proceed if a settlement is not reached.

While a budget is an effective tool for informing the client of the financial impact of not settling, it also serves a more important role as the starting point for developing a settlement range. Indeed, a budget enables the client to consider whether:

1. continued litigation is cost prohibitive and/or
2. the client is willing to incur the necessary expenses associated with taking the case to trial.

In creating a budget, counsel should use his or her best judgment to assess the case and the client's goals to generate a realistic picture of the litigation costs if settlement negotiations fail. Understanding the scope of future litigation phases is important to building a budget. This includes first identifying the assumptions underlying the case, such as the duration or complexity of the matter, which serve as the foundation for the budget.

Next, counsel should evaluate how he or she will staff the budgeted tasks with the available resources (lawyers, paralegals, document clerks, etc.). Finally, counsel should estimate the amount of time necessary to perform each task.

Armed with a realistic budget, counsel and the client can then compare the costs of taking the case to trial with the possibility of obtaining a business resolution at the mediation.

Consult with Experts

Consulting financial experts are in a unique position to provide premediation assistance to parties and their counsel. When preparing for a mediation, engaging an expert early in the process can yield significant benefits, particularly in cases involving complex financial disputes, complicated damage calculations, valuation issues, or forensic accounting.

A consulting financial expert can help accomplish the following:

"[T]he effective use of a consulting financial expert during the premediation assessment process can enhance the likelihood of resolving a complicated financial case."

1. Isolate and clarify critical financial issues in the case
2. Identify missing information
3. Temper expectations
4. Offer innovative solutions to help achieve a settlement

During the premediation assessment, a consulting financial expert is also able to objectively analyze the parties' positions to project a realistic outcome by (1) providing the client with an unbiased opinion on the financial aspects of the case and (2) supporting counsel's legal evaluation of the case as counsel heads into the mediation.

In addition, a consulting expert can pinpoint major areas of dispute between the parties prior to the mediation, which can facilitate productive brainstorming to explore viable options for the client to reach a successful resolution. In short, the effective use of a consulting financial expert during the premediation assessment process can enhance the likelihood of resolving a complicated financial case.

Consider the Roadblocks

Impediments to settlement can thwart a potential resolution if not adequately contemplated before the mediation. Such impediments should be identified and assessed to determine (1) if they are indeed "deal breakers" or (2) if creative settlement paths exist to overcome them.

Such obstacles can include the following:

- Prior failed settlement negotiations
- Insufficient resources to fund a settlement
- The desire to avoid copycat lawsuits
- Your client's need to respond to a frivolous claim
- Reputational and/or stock price concerns
- Difficulties in reaching a global resolution where multiple parties are involved
- Stakeholders who would rather lose the case than settle

Analyzing potential settlement hurdles allows the client to make an informed decision as to whether a resolution is feasible. With ample preparation, however, no impediment should act as an absolute bar to settlement. Indeed, the beauty of mediation is that it is not a win-lose proposition, but rather an opportunity for the parties to craft creative solutions that are not otherwise available in litigation.

Counsel can reframe potential obstacles or propose settlement alternatives that may lead clients to reconsider their positions in such a way that their needs and interests are satisfied notwithstanding the potential impediments.

Of course, moving the client from an entrenched position is no easy task, but sacrificing the opportunity to develop inventive solutions is likely to lead to expensive, time-consuming litigation. In general, evaluating potential barriers as part of the premediation assessment can lead to the development of creative settlement remedies that overcome most, if not all, of the hurdles to a mediated settlement.

Generate and Weigh Settlement Options

The next step in the premediation assessment process is to establish the monetary settlement range that would satisfy the client, along with any nonmonetary solutions that could resolve the dispute.

Counsel and the client should first conduct a brainstorming session to identify possible settlement options that will address the client's needs and interests and help achieve the desired end result. Counsel should think outside the box and consider innovative solutions that will fulfill the client's needs, interests, and goals.

Once potential alternatives are refined, counsel should prioritize those options and place a settlement value on each. In doing so, he or she will define the client's settlement range.

Next, counsel should collaborate with the client to evaluate the range of acceptable outcomes and the viability of each potential settlement option. It is important for counsel to have a candid discussion with the client about the likelihood of each option leading to a resolution.

Some basic questions for counsel to ask include the following:

- What are the costs and benefits of this option?
- Are there any nonmonetary costs in pursuing this option?
- Is this the best possible outcome?

- Does this outcome satisfy the client's needs and interests?
- Is the other side likely to find this option acceptable?

Counsel's role is to guide the client as it considers the costs and benefits of each settlement option and to assist in prioritizing the options and weeding out unacceptable or unrealistic options.

When analyzing settlement options, also consider litigation costs and risks, along with the business costs and reputational concerns associated with proceeding to trial. Assigning a probability to each settlement option can help identify those that are most likely to result in a compromise.

Counsel can calculate this probability using the following formula:

Plaintiff's likely percentage of success
× Likely damages award
+ Defendant's projected attorneys' fees and costs
= Defendant's loss exposure

For example, if counsel and the client believe that counsel has a 60 percent chance of defeating the plaintiff's $1 million claim at trial, with expected legal costs of $300,000, the potential settlement value is $700,000.

Although there are differing schools of thought as to how much of this evaluation counsel should share with the mediator, candidly disclosing such information can enable the mediator to more effectively assist the client in developing settlement options and ways to overcome settlement impediments. In any event, counsel should support each proposed settlement option at the mediation with a rationale that is buttressed by documents, calculations, and/or expert opinions.

The worst possible settlement option to present at the mediation is the one that is pulled from thin air, leaving the mediator and the other party dazed and confused. With adequate preparation, however, every settlement option the client presents will have a well-reasoned justification and supporting calculation to share with the mediator and the other side.

Develop Potential Settlement Structures

Prior to the mediation, counsel and the client should also review possible settlement structures, so counsel is prepared should the parties reach a compromise. By addressing potential settlement terms before the process begins, the parties can ensure that they are in the same bargaining zone before investing the time and incurring the costs associated with mediation. Accordingly, outlining a settlement structure as part of counsel's premediation assessment allows counsel to focus on the critical issues in the dispute.

Because a mediator is likely to lack deep insight into the client's business relationship with the other side, the client is in the best position to develop a settlement structure that will satisfy his or her business needs going forward. Of course, there is no guarantee that the parties will agree on a settlement payment or final resolution. However, the consideration of potential structures is a starting point for developing a path to settlement.

Some common settlement agreement provisions that warrant counsel's attention during the premediation assessment include the following:

- What claims will be released?
- Which parties will be released?
- How broadly will the releases apply?
- Is a confidentiality provision and/or nondisparagement clause necessary?
- Will the parties pay their own attorneys' fees and costs?
- What is the accepted method of payment for a monetary settlement?
- Are terms needed to address unique circumstances, such as tax issues?

Once counsel develops possible settlement scenarios with the client, the terms should be memorialized in writing. The proposed term sheet should outline paths to settlement that warrant further discussion with the other side. While the term sheet should be streamlined and fairly brief (e.g., several bullet points), it should include provisions for each settlement scenario that the client believes are vital to settlement.

The proposed term sheet document should then be shared with the other side and perhaps the mediator. Considering these issues prior to the mediation can avoid a worst-case scenario in which the parties agree on a settlement, but a satellite issue—such as confidentiality—derails an otherwise amicable resolution.

Schedule a Premediation Conference with the Mediator

Arranging a meeting between the mediator and the client prior to the mediation session may accomplish the following:

1. Previewing the client's settlement positions
2. Avoiding potential pitfalls on the day of the mediation

While premediation conferences serve many purposes, perhaps the most obvious goal is to clarify the logistics and ground rules for the mediation. Examples of such issues include who will participate in the mediation and whether the parties will make opening presentations.

The pre-meeting can also serve to highlight the interests and settlement options that are important to the client and to narrow the disputed issues. The mediator may, for instance, identify issues or options that he or she believes are not essential to achieving a resolution.

At the conference, counsel also can preview and test the premediation assessment with the mediator, including the perceived strengths and weaknesses of the case. The mediator may provide feedback on issues that counsel and the client had not previously considered, which may lead the client to refine his or her settlement range.

Moreover, the mediator may suggest topics to include in the mediation statement and/or to address with the other party in a joint session or opening statement.

In short, conducting a premediation conference is an effective way to:

1. develop rapport with the mediator,
2. educate the mediator on the dispute, and
3. clarify your client's expectations and goals for the mediation.

Conclusion

Engaging in a premediation assessment is a wise investment of time that has the potential to yield many benefits, including cutting litigation costs and enhancing settlement outcomes.

In addition, the client will enter the process more confidently. This is because the client had a say in setting goals for the mediation at the outset—rather than having to define its objectives in a reactive fashion under time pressures.

The mediation session itself will also prove to be less stressful for counsel and the client because counsel has "done the homework," having:

1. reviewed important documents,
2. considered the case strengths and weaknesses, and
3. evaluated settlement options.

There should be no surprises; counsel should be unflappable.

While the mediation may not necessarily result in a final settlement, counsel and the client can rest assured that the legal adviser has set his or her client up for the best likelihood of success at the mediation. Counsel has fully prepared; now "go with the flow."

Notes:

1. ABA Section of Dispute Resolution Task Force on Improving Mediation Quality: Final Report 7,10 (2008), available at https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.authcheckdam.pdf.
2. "Client," as used throughout this discussion, refers not only to clients of outside counsel, but also to clients of in-house counsel, which may include officers, finance departments, business units, lines of business, and other interested stakeholders.
3. Dwight Golann, "Cognitive Barriers to Effective Negotiation and How to Overcome Them," *ADR Currents* (Sept.-Nov. 2001), 6–9, available at https://community.adr.org/docs/DOC-1152.
4. Id. at 7–8.

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