



Improved client preparation leads to better money negotiations in mediation

The client who understands how this mediation thing works is more likely to be satisfied with the result of the negotiation

By DOUG DeVRIES

The premise of this article, based on the author's more than 40 years of experience dealing with such matters, is that the mediation process and its participants are better served when attorneys, both plaintiff and defense, devote specific attention to preparing the client for negotiation in advance of the mediation. When such preparation is undertaken, both the mediation process and the substance of the negotiation are better facilitated and

the experience of all involved is generally enhanced.

Mediation is a complex human activity occurring, as it does, during unresolved disputes, usually under significant personal stress and, not infrequently, with relatively high stakes at play. As a matter of course in litigation, the primary focus of attorneys is on the facts, the law and the evidence associated with the dispute. Mediation, however, does not involve a process aimed at resolving those aspects of disputes; it cannot and does not serve

to decide factual disputes, rule on evidence or resolve legal issues. Instead, mediation is intended to be a confidential respite from the adversarial attempts to resolve such matters in order to allow the parties to negotiate and hopefully focus on and achieve resolution of the dispute by mutual agreement.

In order to maximize the effectiveness of the mediation process, attorneys are well-advised to turn their attention from winning (or losing) the dispute at all costs to reasonably and realistically



assessing risks and the prospects for a settlement that serves the best interests of their clients (and themselves). Attorneys who hope to make the best use of the mediation process should include interactive preparatory work with their client aimed at laying the foundation for a meaningful and hopefully productive negotiation.

Before considering how attorneys can best prepare their clients (and themselves) for participation in mediation, it should be noted that effective counsel come in many types. Obviously, in litigation there are plaintiff attorneys and defense attorneys who play different roles in significantly different frames of reference and client interactions. Beyond such obvious differences, there is the important matter of individual style or technique. There is no one-size-fits-all way for an attorney to litigate a case. By analogy, artists Rembrandt and Picasso achieved artistic greatness utilizing markedly different styles. Likewise, some attorneys may be highly detailed and legalistic in their approach and others may be highly generalized and intuitive in their approach, and both can be effective.

With this notion in mind, the approaches discussed in this article can be modified or qualified by the highly variable realities of attorney style and technique as well as the circumstances of a case. This article assumes, however, that the participating attorney, regardless of style, has, at a minimum, a genuine interest in preparing their client for negotiation and in participating meaningfully in the mediation process; without such interest, an attorney may well undermine the process and engender a failed negotiation.

Getting to an endpoint requires compromise

Negotiated settlements between litigants rarely result from one side capitulating to the other on the merits of the dispute. Parties tend to hold firm and adhere to their stated positions throughout the negotiation right to the end.

Likewise, parties tend to act and make decisions in furtherance of their own self-interest, neither acknowledging nor conceding to the opposing party's interests. One should anticipate at the outset that a successful litigation-related money negotiation in mediation will come down to an attorney and their client having to make a predictably difficult endpoint decision that involves compromise to one degree or another. In the final analysis, such compromise is best assessed not in terms of whether it represents a win or a loss, but rather in terms of whether it reasonably and realistically serves one's own self-interest under the circumstances. The approach to client preparation suggested below is aimed at helping to put the client and their attorney in the best position to accomplish this objective.

Gain a deeper understanding of the client

While this discussion applies primarily to clients who are plaintiffs in litigation, it will also apply in some significant respects to the defense as well. Obviously, individual defendant parties can be involved, but even when insurance companies or other business entities are involved, it is individuals associated with those entities that determine settlement authority and strategy, actively participate in the negotiations and are instrumental in making the ultimate decisions that produce success or failure in mediation. While the relationship between defense counsel and these persons is different than that between plaintiffs and their attorneys, both relationships share many similarities associated with human interaction and decision-making.

In the litigation context, it is understandable that attorney preparation focuses primarily on gaining an understanding of the client's legal rights and interests, their losses and damages, and the appropriate remedies or defenses available. However, none of that information informs an attorney about who their client really is when it comes to participating in activities relating to negotiation

and settlement. To gain a deeper and more relevant understanding of the true nature of the client, the attorney has to spend more time with the client discussing things other than the case itself.

For instance, the attorney should explore and gain understanding about how the client perceives and deals with the idea of compromise, how the client receives and processes information (including negative or adverse information) and how the client analyzes options and makes decisions. In this regard, is the client a linear or non-linear thinker?

A linear thinker tends to be solution oriented; they identify problems, efficiently accumulate and organize information and move linearly to selecting and implementing a solution. This approach generally squares with the way attorneys and mediators tend to move through the negotiation process toward agreement and resolution.

Non-linear thinkers, on the other hand, tend to be problem oriented; while they identify problems and accumulate information, they tend to seek out as many alternative options as they can and then have difficulty moving to selection of a solution (e.g., procrastination). When pressed to select a single solution and make a final decision, they may offer resistance and have difficulty with closure. Such a trait, if not identified and addressed in advance, can provide an impediment to achieving a settlement.

How the client processes information

How does the client process information? Input-auditory-receptive, visual-receptive, or a combination of both?

That is, some people receive and process information better when hearing it presented verbally and some people better when seeing it presented graphically. A classic example is communicating a BATNA/WATNA analysis (Best Alternative To A Negotiated Agreement and Worst Alternative To A Negotiated Agreement) to a client in order to explain how costs, attorney fees and risk can affect the



client's net recovery under various scenarios.

Some people just need to see it written out before they can really appreciate and respond to it. This difference can be important because it will help the attorney frame how best to effectively communicate with the client during the negotiation and in the process of finalizing a settlement decision if the opportunity presents itself.

Does the client perceive himself or herself to be a leader or a follower in the attorney-client relationship? Do they want to give direction or take direction? Is the client passive or aggressive, or passive-aggressive? The passive client tends to look to and rely on the attorney to determine the outcome of settlement negotiations while the aggressive client tends to question the attorney's judgement and subordinate the attorney's opinion to their own. The passive-aggressive client is often difficult to read, to communicate with and to reason with, and in the end can be the most resistant to sound advice, even advice that is in their own best interest.

Understand the motivation

What is really motivating the client in their pursuit of the litigation? Is it the money or is it retribution or is it some other monetary or non-monetary factor? For instance, in wrongful death cases the surviving relative or relatives, while superficially pursuing money may also be dealing with deeper and more personal issues of honoring the departed or having difficulty with final closure about the loss. Such non-monetary interests and motivations may present obstacles to finalizing a money settlement because money does not necessarily satisfy such interests. In another possible situation, if a client has an immediate financial need, which may be caused by or unrelated to the dispute at hand, satisfying that financial need may lead to a willingness to compromise in the negotiation more than might otherwise be expected. The point here is that it is the client's case and it is

their interests that are ultimately served by settlement; so, it is obviously important to know and appreciate their real operative interests.

Is the client someone who embraces risk or is risk averse? This is an important consideration because, as discussed more fully below, litigation of a legal dispute is rarely without risk of an adverse outcome, and ultimately risk affects both case valuation and decision-making. Moreover, at every stage of a case and at every phase of a negotiation, the presence of risk can affect the cost-benefit analysis that goes into making decisions about whether or not to go forward, whether or not to spend more time and money in the effort, or whether or not to settle. In evaluating decisions concerning potential settlement, risk takers tend to discount the costs and obstacles that stand in the way of recovery while risk averse individuals tend to place higher value on predictability and certainty of closure.

Gain a deeper understanding of oneself

When participating in settlement negotiations in mediation, attorneys can face a challenge in balancing their role of zealous advocate of the client's cause and their role of circumspect counsel assessing compromise and providing advice in the client's best interest. In most circumstances, clients look to their attorney for advice and guidance, and clients are usually influenced in how they view the case by their attorney's attitudes and behavior. The attitudes and actions that attorneys exhibit in fighting litigation battles may not prove ultimately to be productive in the mediation setting.

Attorneys who dismiss the realities of risk, exaggerate the merits of a case or endorse unrealistic or unfounded prospects for successful outcome can breed unrealistic and unfounded client expectations. This is almost always a mistake in a negotiation setting if the aim is to realistically and reasonably assess risk and compromise. Attorney posturing

(acting in an overtly aggressive manner inconsistent with the reality of the case) can backfire and make it more difficult to obtain sensible closure when it becomes advisable or necessary.

As part of pre-mediation preparation of a client, attorneys are well-advised to explain the difference between advocacy and counseling and how they will likely play out over the course of the negotiation. The advocacy (and even posturing) that will be emphasized in a mediation brief, in the early stages of the negotiation and even throughout the negotiation, is in furtherance of an effort to influence the thinking of the opposing party (and the mediator) about the potential risks presented to the opposing party by plaintiff's allegations. Either parallel to, or in transition over the course of the negotiation, counseling the client about risk and its impact on case value will also have to occur in furtherance of advising the client about negotiation moves and ultimately the desirability of settlement.

Identify the client's real decision-maker

As part of getting to know the client better in the context of mediation preparation, it is imperative that counsel identify who the real decision-maker will be when it comes to making a final decision about settling the case.

On the plaintiff side, is the decision-maker, as one might tend to assume, the client? Or is it a relative of the client or a trusted friend or acquaintance of the client? If the real decision-maker is not going to be the client, is the real decision-maker going to be present at the mediation and engaged in the process? These are important considerations because the least rational way to finalize an informed, reasonable and realistic settlement decision is to have it made or significantly influenced by someone who is not directly involved in the exchange of information and dynamics of negotiation. In a worst case scenario, the client will call someone not in attendance for guidance, or even



for the actual decision, such as may be the case when an absent spouse is consulted telephonically. This may be someone the attorney does not know well or has not even met.

On the defense side, especially when insurance or other business entities are involved, the role of the real decision-maker is typically determined in advance of the mediation as part of a routine institutionalized process that develops and finalizes settlement authority and related negotiation targets. However systematic or organized the preparation for negotiation, it does not ensure that the real decision-maker will be present at the mediation and directly involved in the negotiation. Suffice to say that experienced mediators make the effort to fully understand the situation at hand and can assist in assuring that real defense decision-makers will become involved in the process as necessary.

Explain the mediation and negotiation process

Unlike the typical defense side in a mediation, plaintiffs are usually experiencing mediation and litigation-related negotiation for the first time, and this type of negotiation is quite different than any negotiation a client may have experience with, such as buying a car or house or seeking a raise at work. Therefore, they have no idea what to expect and have no past frame of reference upon which to base expectations. Given the importance of the case and its outcome in the client's life, and given what will be asked of them in terms of participation and decision-making, it is incumbent upon counsel to fully inform the client about the mediation and negotiation process prior to the mediation.

In terms of the mediation process, the explanation should, at a minimum, include the confidential nature of the process and the natural role of the mediator. It should also include the basics of competitive or distributive negotiation,

including the fact that plaintiffs make demands for money that of necessity must start higher than they may ultimately be willing to take as well as the fact that in response it is predictable that the defense will start with an offer that is substantially lower than they may be willing to pay. In conjunction with such an explanation, it is important to caution against over-reacting negatively at the early stages of the exchange of demands and offers. This is important because as a general rule, progress in negotiations ultimately involves moving from a negative focus on the opponent and their positions to a positive view of a mutually agreed outcome (even if reservations persist). The longer a reactive negativity or animosity remains in play, the longer difficulty in moving toward resolution persists.

Explain risk and how it impacts case value

It is the rare case in litigation that does not confront adverse risks, whether they pertain to liability, causation, damages and/or defenses. In addition, it is axiomatic that the effect of multiple risks on outcome is cumulative – the greater any particular risk or the greater the number of risks, the more the uncertainty or unpredictability of success. Risk presents itself in litigation in a myriad of ways; it can manifest in such things as unexpected witness testimony or documents in discovery, an adverse judicial ruling on a motion and the inherent unpredictability of jury determinations. In addition, there may be additional risks associated with appeal even after success at trial.

In turn, if a perfect risk-free case would be worth \$X, then a case having to overcome risk to obtain a recovery will obviously be worth something less than that amount. To complicate matters, there is no formula that can be applied to cases to predict their ultimate outcome or to determine their value. The variables at play are simply too great – specific facts of every case are different, as are every party, witness, judge, jury and appellate

panel. Therefore, in informing clients, attorneys look to their own experiences, to the experiences of colleagues, to results in similar cases and to their judgment of the quality of their client and the facts and law of their case. Increasingly, attorneys also resort to one form or another of focus group assessment.

What is important about risk-value considerations in preparing clients for mediation is that, at a minimum, the client is introduced to the concept and achieves a basic understanding of it. The understanding need only be general at first so it can be built upon and expanded as the give-and-take accompanying exchange of adverse party positions progresses during the mediation as part of the negotiation.

Explain the costs, fees, liens and potential client net recovery

What a client will care most about as negotiations near conclusion in mediation is what they are going to net in their pocket out of the settlement after payment of litigation costs, attorney fees and third-party liens. Therefore, it is best to know going into a mediation what the costs are, what the attorney's fees will likely be as well as both the gross lien amounts and predicable negotiated net lien amounts. These figures will be necessary to inform the negotiation with the opposing party and for projected and actual client recovery calculations.

In addition, it is not uncommon for attorneys to compromise their fee in order to get a deal done under what the attorney considers to be appropriate circumstances. Sometimes clients request (or insist) that attorneys do so if they are to accept a settlement the attorney recommends. Clients need to be aware that such matters are solely between them and their attorney; effective mediators do not raise or discuss this topic or any issues related to it, nor will they get involved in such interactions and discussions between attorneys and their clients.



Explain negotiation techniques and strategies

As noted above, clients are unlikely to have any prior experience with the type of negotiation confronting them in a mediation. Having advised a client generally about the nature of the negotiation and mediation process, the attorney may wish to at least introduce some of the techniques and strategies that might come into play.

First, competitive or distributive negotiation involves the exchange of demands and offers that define a field of potential numbers over which the parties will compete for position.

Second, bracket negotiation is a variation of competitive negotiation in which parties exchange self-selected negotiating fields defined by movement of the demands conditioned on preselected required offers.

Third, range negotiation involves confidential discussion by both sides with the mediator exploring estimates of verdict ranges and corresponding ranges of possible settlement.

Fourth, confidential negotiation involves the mediator confidentially discussing and exploring settlement targets with parties and attempting in the process to move the parties closer together.

Explain and obtain agreement about negotiation objectives

The defense's approach to mediations and settlement is usually institutionalized, and the product of established practices and procedures. Claims people and attorneys, and sometimes financial people, work together to determine authority levels and settlement targets in advance of mediation. While admittedly simplified, it is fair to say that the defense usually comes into mediation with a target number for settlement in mind and fall-back targets, if necessary. In addition, they may or may not have in place a third level of existing authority or, failing that, a process in place for obtaining higher authority if deemed necessary and appropriate based on developments in the negotiation at mediation.

While plaintiff attorneys do not act like, and are not expected to act like, insurance companies or other business entities, it can serve their client and their cause well to have a plan in place composed of objectives going into mediation. Attorneys can discuss a settlement target with the client in advance – the “want” number. They can also discuss what would be acceptable if they cannot get what they want – the “willing” number. Finally, they can discuss what might have to be done if they cannot get what they want

or what they think they are willing to do if it makes sense – the “have to” number.

These discussions about objectives are not meant to lock the attorney and client into inflexible settlement positions, but rather to develop a preliminary strategic framework or plan to guide negotiating positions. The final decision-making about settlement will occur when actual money is being offered and is available for the taking, which presents a real change in circumstances and dynamics of decision-making. Attention to pre-mediation client preparation, as described in this article, can hopefully serve to make that real-time decision-making a better informed experience.

Doug deVries is a mediator with Judicate West, primarily handling complex mediations, including insurance claims, coverage and bad faith, significant personal injury, wrongful death, products liability, professional liability (legal and medical), commercial litigation and class actions.



deVries

