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What Mediation Counsel Can Learn from the Boy Scouts of America

By Edmund J. Sikorski, Jr. – June 19, 2015

Most problems encountered in any endeavor come from lack of preparation. In the context of mediated case resolution, there are two separate but inter-related and inter-dependent preparation activities simultaneously in play. The first is counsel preparation. The second is client preparation. Failure to do either or both will result in almost certain disaster. Any attempt to "just wing it" will meet with the same consequences as Icarus.

Six Components of Counsel Preparation

First: Select a mediator with subject matter knowledge. The ABA Section of Dispute Resolution Task Force on Mediation Quality found that "to a very substantial degree users endorsed the importance of subject matter knowledge" (2008a, p. 9).

Depending on the nature of the case, for a mediator to come up with the right questions to facilitate resolution may well require that the mediator have significant experience in a particular field. Mediators with knowledge and experience in that area can not only provide those questions, but do so with the respect of the parties, based on their experience and expertise. A key hallmark of an effective mediator is the ability to hear what is not being said in order to cut through to the real motivating issues.

Second: **Identify and require the presence of the real decision maker(s).** If the real decision maker(s) is not a participant, the entire process becomes meaningless—an exercise in futility—and a waste of time and money.

Third: Provide and require adequate exchange of information. The entire mediation model is predicated on *all* of the parties having *all* of the *same* information. If all of the cards and supporting documents are not "on the table," it is unrealistic to think that there can be a satisfactory result or at least resolution on terms acceptable to all.

Adequate information means sufficient information to make an informed settlement decision. If one withholds information, one must answer the question whether the withheld information adds to or detracts from the legitimacy of the claim or defense during the mediation process. The mediation process is, after all, an opportunity to convince the other side of the legitimacy of the claim and the value of the case.

Fourth: Prepare and effective mediation brief. Mediation briefs are *not* repaginated motions for summary judgment. Mediation briefs are an opportunity to persuade the other side by presenting facts, arguments, and summaries evidence in visually embedded form without the constraints of the formal rules of evidence that make the opposition reluctant

to proceed to trial and willing to consider why resolution on your suggested terms is in their best interest.

Do everything in your power to objectify the claim, position, or defense. Make the content *easy* and *simple* to understand. Scientific and psychological studies advise that the most persuasive presentations are those that can be readily understood, grasped, and adopted by a sixth grade elementary school student.

Fifth: Make an objective case valuation and risk analysis. A risk assessment protocol is an explicit list of the assumptions and calculations that underlie the value derived. Support this protocol with Jury Verdict Research and decision tree probability analysis of the possible litigation outcomes. *See* "Decision Analysis as a Mediator's Tool" David P. Hoffer; *Harvard Negotiation Law Review*, 1:113 (Spring 1996).

Sixth: Develop and stick to a negotiating plan. Negotiation communications that start with a number higher (plaintiff) or lower (defendant) than the parties own case evaluations are inviting emotional reactive responses that shut down the process and lead to impasse for no good reason. All that will be accomplished is an argument between two or more sides that have traded an organized cognitive process for a war of attrition.

Start with a plan beginning with your "best day in court" and systematically moving through your negotiating range to your walk-away number.

Stick with the plan and stay in control of an otherwise reactive process calculated to be self-defeating. As in any military or sporting contest, victory is often achieved because of the wounds inflicted by the other side upon itself. *See* "Civil Negotiations & Mediations" by Nancy Hudgins "Scripting Your Moves" (March 5, 2012).

Ten Components of Client Preparation

An unprepared client may very well become a "difficult" client in the midst of mediation and either precipitate or contribute to impasse when in fact the case should have settled.

The following is a ten-item check list to prepare the client for the mediation experience, thus enhancing the prospect of case resolution. The referenced rules and statutes are from Florida.

First: The client must understand the purpose of mediation. Rule 10.210 provides:

> Mediation is a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.

Rule 10.230 provides:

> Mediation is based on concepts of communication, negotiation, facilitation, and problem-solving that emphasizes:
>
> (a) self-determination;
> (b) the needs and interests of the parties;
> (c) fairness;
> (d) procedural flexibility;
> (e) confidentiality; and
> (f) full disclosure.

Second: The client must understand the mediator's role, i.e., what a mediator does and does not do. Rule 10.220 provides:

> The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate authority, however, rests solely with the parties.

Simply put, the client must understand that the mediator owns the process, but the parties own the result.

Third: The client must understand the process and know what to expect procedurally and substantively. Procedurally, the client needs to know that traditional caucus based mediation follows a format:

a) *Mediator opening statement.* It explains the process and remind the parties of the ground rules of civility.
b) *Joint meeting statements of the parties.* This is perhaps the first and last time that the parties will actually have the opportunity to "tell their story as they see it" to the other side without interruption.
c) *Caucus.* This is where the real work begins and preparation pays off. Unless the client is well prepared, the negotiation over what amount of money will be paid may very well be perceived as a frustrating auction process of concessions and adjustments that stimulates emotional responses rather than reasoned assessments that soon spiral into an emotional crash that deprives the parties of the opportunity to reach resolution before their best numbers are reached. A predetermined plan of negotiation is essential to combat the natural reaction of emotionally responding to the offer and counter-offer process. It is absolutely essential to make a negotiating plan and stick to it [duplicative].
d) *Impasse or written settlement agreement.* Impasse is in theory a point when despite the efforts of the parties, they cannot come up with a solution or number

> that one party will pay to the other to settle the case. One or both parties leave the meeting, and the mediator files a report with the judge of the case limited to the simple fact that no agreement was reached.
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> But are we really done with mediation? Probably not. We know that only a few percent of cases actually go to trial. Perhaps one side or the other needs to think, rethink, digest, and reevaluate what they really want or need. Many mediators follow through with the parties counsel after a short period of time to see if they can rekindle the process of resolution. It is common to find that although the parties want to continue to seek resolution, they are reluctant to initiate the process for fear of being perceived as weak. F.S 44.404 and Rule 10.420 are instructive on the subject of mediation duration in both court order and voluntary mediations, as well as the requirement that a mediation agreement be formalized by the parties.

Fourth: The client must understand the confidentiality of the entire process. F.S. 44.405 is straight forward:

> Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or participant's counsel.

In short, what is said or shown there stays there. This is not to say that otherwise discoverable or admissible evidence cannot be used in later proceedings or trial. Mediation is designed to provide a forum in which the client can "tell their complete story, point of view, and express emotions and concerns that may not come out because of the rules of evidence or trial procedure.

Fifth: The client must understand the relevant facts and what evidence is or is not likely to be admissible. For example, what a client believes about the other party's intentions is not fact. What one party may have heard about the other party is not admissible evidence. Claim criteria must be objective to credibly support the claim or allegation.

Sixth: The client must be prepared to understand what the law can or cannot give him/her. Saying it differently, the client needs to understand the remedy the client hopes/wants to achieve. Not all wrongs have an earthly remedy much less a legal remedy. Aside from Constitutional and Statutory interpretations or determinations, courts can only do two things:

1) Grant or deny personal liberty.
2) Order transfer of property (including money) from one person to another.

If the remedy the client is expecting is other than either of the above, adjustment of expectations is in order.

Seventh: The client must be informed of the facts in possession of the adversary. The corollary of this proposition is to "make sure the other side has all the information in your possession." The mediation process is heavily dependent on:

1) a frank exchange of information;
2) justification of value; and
3) a genuine interest to resolve the claim and avoid the risks of trial including attorney client conflict over disappointing or unanticipated results.

Eighth: The client must be given reasonable expectations of case value and/or realistic outcomes *and the reasons why*. Valuing a case is not an exact science, but it is the job of a lawyer prior to mediation to learn as much as possible about the case (it is usually not possible to know everything), compare it with similar cases that have produced settlement and verdict, and reach a conclusion about the range of value into which the case will fall.

Case evaluation *starts* with an assessment of damages, and then *discounts* with case and trial *liabilities* including costs, present value, trial uncertainties such as how the judge applies the law, how the facts come in, how well the experts will testify, how well the other side's lawyer tries the case, how the jury will react to the witnesses and the attorneys, along with a myriad of other contingencies and contingencies.

The mediation is sure to fail and create attorney-client friction if the attorney and client just "wing it and see what happens."

Ninth: BATNA and WATNA—decision time. BATNA is an acronym meaning "Best Alternative to a Negotiated Agreement." It represents the available alternatives when a party is unable to negotiate an agreement. It usually means going to trial.

WATNA is an acronym meaning "Worst Alternative to a Negotiated Agreement." It represents the available alternative when a party is unable to reach an agreement on what the party thinks they want. It *always* means going to trial.

In addition to the myriad trial uncertainties, there has recently emerged another reason why adopting the position "I'll take my chances in court" is an unrealistic emotional response to be avoided. It suggests that your BATNA is really your WATNA.

In 2008, Vanderbilt University Law School conducted and published a study based on a survey of 295 Florida state circuit court judges. The study concluded that judges rely

heavily on intuition when making decisions on the bench and allow distractions to influence their decisions. In other words, decisions are reached and then the reasons for the decision are established rather than the other way around.

Tenth: Clients must understand that they must prepare themselves for the mediations session. They must prepare themselves in the following ways:

a) Participate in at least one pre-mediation session with his/her/their attorney.
b) Arrange for appropriate child care and time off work.
c) Turn off all personal electronic devices.
d) Discuss the case with affected third parties and/or bring them to the mediation.
e) Remember to depersonalize comments of the mediator and other parties, and above all, keep reactive emotions in check. Mediation takes 10 percent courage and 90 percent commitment to the process.

Conclusion

If you ask a lawyer to answer most questions, the response will most often be preceded by the phrase, "That depends…" There are naturally exceptions to most, if not all, rules. *Mediation preparation is one of those exceptions. Mediation success is totally dependent on preparation.*

BE PREPARED. Thank you Robert Baden-Powell (Founder & Chief Scout of Boy Scouts Association, 1908)

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