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“We often get caught up in our own reactions and forget the vulnerability of the person in front of us”

- SHARON SALZBERG

Mediation is something that as lawyers we become very used to. We understand the process, we get the ebbs and flows of mediation and we know not to react to the posturing that takes place during the course of the mediation. But the same is not true of our clients. For any non-institutional clients in particular and for some institutional clients the mediation that they are attending may be the only exposure that they have ever had to mediation. In addition, clients will often be very personally invested in the outcome of the mediation. For these reasons, your client's reactions, interpretations and perceptions of what is happening at mediation is much different than what yours as their counsel is. One of the most important elements to ensuring a successful mediation is to ensure that your client is properly and fully prepared.

As counsel we know that one of the predictors of outcome in any work that we do is preparation. The more prepared we are for any step in a legal proceeding, the more likely we are to get the outcome that we are aiming for. The same is true for mediations, however in mediations rather than focusing solely on the various components of the case as we do in other legal proceedings, your preparation also must include the intangibles that can affect the mediation experience. If you don't spend some time on these intangibles, the result may be lost opportunities in interference with achieving optimal settlement outcomes. Preparation for mediation involves attention to the process, the substance and emotional elements. Preparing your client and yourself for challenges of the mediation process and potential emotional impacts is a necessary part of preparation.

As a mediator, one of the first things I do is spend time with the parties on an individual basis. I do this to get a sense of the personalities that I am dealing with in the mediation and

to gauge the different factors that will make the mediation go more smoothly for the individuals involved. Everyone is different and everyone handles the stress of the uncertain differently. As a mediator I believe I can be most effective when I have taken the time to get to know the individuals involved, to gain their trust and to get a sense of what will be important to them in the mediation process.

As counsel, you play a vital role in this. By the time a case has gotten to mediation you have spent a lot of time with the evidence, with the theory of the case, with the witnesses and most importantly with your client. You will know your clients' particular approach to things and will know what is important to them. Sharing that with your mediator will help the process go more smoothly.

Your preparation of your client is a vital step in the mediation process. That preparation is focused on preparing your client for what to expect at the mediation. The more that your client knows about what will happen at the mediation, the higher the likelihood that the case will settle at mediation. That preparation starts with an understanding that your client has no familiarity with the process at all. Explain the process to your client. That explanation should include that the mediation is not just another step in a series of adversarial steps, but rather that the mediation and the mediator are tools or resources. As much as possible, view the mediation and coach your client to view the mediation as a joint problem-solving collaboration.

Early on in the process explain to your client the reasons to engage in a mediation and the reasons for the timing of the mediation. Some factors to consider include risk assessment, costs that will be incurred in the future, proximity of important procedural events in the case and the general litigation climate.

In providing that explanation, include such matters as:

- Where the mediation is taking place and how to get there
- Where to park
- The general set up of the mediation rooms
- The role of the mediator
- The typical structure of a caucus mediation
- What will happen in joint session

- Signing of the agreement to participate in the mediation and the confidentiality that covers mediations
- Protocols for private sessions
- How caucuses work
- The time that will be available to speak privately
- Availability of food and beverages
- How the mediation ends

Take the time to explain to your client how you anticipate your communications with opposing counsel/parties and the mediator will be. Your client may have different expectations because of the non-adversarial nature of mediation as opposed to other steps in the litigation process, particularly if the client has had an opportunity to observe you in a court or litigation setting.

Anticipate the flow of negotiation within the mediation and have a candid discussion with your client about what to expect. This will help alleviate the stress of the mediation and can help build not only the client's own self confidence but also their confidence in you. Discuss your case evaluation in advance of the mediation as well as what you anticipate to be the views of the opposing side. Don't box yourself in in this discussion, rather make it clear that a negotiation is a risk assessment, a mediation is an opportunity to learn more about your case and that learning may change your risk assessment.

Explain possible versus probable outcomes and explain what that range is based upon. You bring significant knowledge and experience to the table. Explain to your client that that knowledge and experience allows you to assess risk. Explain that although there are a variety of items that you are able to control at a trial, there are always variables beyond your control and those variables can impact an outcome. Discuss in advance any issues that you have identified with the evidence or with the case so that your client is not taken off guard when they are raised by the other side.

Understand and explain the mediators role at a mediation. It could be seen as most closely aligned with that of a devils advocate. Explain this to client so they don't think that the mediator is on one side or the other. Encourage the client to appreciate that getting feed-back from the mediator is one of the opportunities of mediation and can assist you both in refining the picture of what is a satisfactory resolution. As a mediator, I cannot give legal advice and am not in a position to give any sort of assessment of risk. I am able to point out to the parties however what is being communicated by the other side and to challenge each party to take that into consideration in their risk assessment. Mediation is a potential learning opportunity to see how others view the risks presented in your case. When you present mediation in the framework of a learning opportunity it helps your client be more flexible and involved in the mediation process. This framework sets the client up to be ready to adjust their sights with your guidance to see the wisdom of being influenced by a different point of view during the mediation and encourages patience with the process itself.

Don't underestimate the impact that your opening demand or response has and think carefully about it. There are many times where you are sending a message with an opening demand

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or response. Failure to consider thoroughly the impact of that opening position and to communicate that with your client has the potential to derail negotiations. If your opening position is completely out of line with an expected outcome, understand that it has the potential to make your client positional and to make it difficult if not impossible to move them to a realistic position. Understand as well that opening positions that are entirely unrealistic send messages to the other side and sometimes the message is that your client is completely unrealistic and can set the stage for preventing the other party from putting their best foot forward. These holds equally true whether you are acting for a plaintiff or a defendant.

During the course of the mediation, help your client understand some of the net impacts to a settlement, which can help them to make a better informed decision. For both sides there are a variety of net factors that need to be taken into consideration – the cost of proceeding to a trial, the delays associated with proceeding to a trial, the uncertainty of outcome and the potential for appeals. Spending the time talking to your client about these “net factors” helps them to be a better informed decision maker and can create opportunities for reasonable settlements. These types of discussions also build support for the client’s trust in your own recommendations and demonstrates your ability to be a sound advisor.

Preparing clients emotionally is probably one of the most important steps that you can take prior to the mediation. Give your client the tools to manage emotional reactivity during the course of the mediation and don’t let emotions take over the negotiations for either you or the client. Understand and take into consideration the following factors:

- Client’s feelings of comfort, recognition and autonomy are essential to the success of the mediation
- Buyer’s remorse
- Advise the mediator of physical comfort issues which can interfere with the client’s participation
- Use the mediator to get information for the client about what, why or how things are happening
- Educate your client about the various roles that the mediator will play – host, hypothetical judge/juror, challenging the client’s case and helping you and the client persuade the other side
- Engage the client in strategy on joint session and consult with the mediator about the best way for the joint session to proceed. If there are linguistic, gender or racial issues let the mediator know.
- Manage the emotional side – what does the client want the mediator/other side to understand about the harm that was done? Are there issues best left unaddressed?
- Be aware of potential emotional triggers for the client
- Build clients’ trust by including them in discussions with the mediator
- Discourage concepts of bottom line or winning at the mediation
- Explain the significant value of the mediation regardless of outcome

Last but not least, ensure that you have done your substantive preparation. Knowing your case, the evidence, the law, the theory of liability are all essential to a smooth running mediation. Substantive preparation increases the likelihood of a good outcome at the mediation. Demonstration of your knowledge and mastery of the case will give client confidence in the mediation process. Take the time throughout the mediation to listen carefully to what your client has to say and summarize to confirm for the client that you have heard them. Prior to the mediation develop a simple theme supported by selected evidence and a presentation strategy for the joint session. In most cases it will also be important to pick a safe but limited topic for the client to speak about. A big part of any mediation is the parties getting to know each other. That opportunity is provided by having your client participate in a meaningful way.

Mediation is a process that uses skill sets not always utilized when lawyers are litigating cases. Taking the time to view the mediation process as a different type of process and altering your preparation to take those differences into consideration can inform the success of the mediation. Mediation is an opportunity to showcase your knowledge of your case to your client and provide you with an opportunity to demonstrate your communication skills. A settlement at mediation can often be the best possible outcome for a client and using all of the skills that you have developed as a lawyer in a unique way can ensure that you provide the best possible chance for your client to achieve that outcome. V

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