The Advocate's Role at Mediation
How to be More Effective

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Mediation has taken root in the legal practice. Unlike litigation with its long history, developed techniques and rules, mediation is in its infancy in terms of skill-based knowledge and techniques for advocates at mediation. Interestingly, there are few rules and limited training for mediation advocacy.

This article will discuss, from the perspective of an experienced mediator, various approaches and ideas advocates may consider using in mediation. These ideas are intended to improve the mediation advocate's effectiveness in representing a client at mediation.

When to Mediate

The first step in the mediation process obviously involves whether and when to mediate. Although most cases would benefit from mediation, there are some situations when mediation may not be appropriate such as cases involving new legal or constitutional issues or where parties insist on a trial. Otherwise, as long as discovery has provided enough information so that liability and damages issues (i.e., risk) can be assessed, a case can be mediated.

Selection of the Mediator

The selection of the mediator is a very important decision in the mediation of a case. Sufficient thought must be given to selecting the mediator. Information about mediators' qualifications, experience and effectiveness can be obtained from other attorneys as well as the mediators themselves. A potential mediator's experience and effectiveness as a mediator should be a paramount consideration in selection. This would include the parties' comfort level in working with the particular mediator. Some cases warrant a mediator with a judicial background or subject matter knowledge of the legal issues in the case. Appropriate consideration needs to be given to a mediator's ability to establish rapport with the parties and effectively facilitate the dispute.

Preparing the Client

Although an advocate will have already assessed the case for their client prior to the mediation, the client or company representative must be prepared for the actual mediation. The mediation process should be thoroughly explained including who will be present and what might occur during the mediation. The client should be instructed on how important it is to participate in the mediation by talking, listening and evaluating what is happening at the mediation. Without active participation by all parties at the mediation, the mediation process will not achieve its potential outcome. The proper parties need to be present at the mediation for a productive mediation to occur. However, if key people cannot attend, they should at least be available for participation by telephone.

Planning Your Mediation Strategy

Mediation advocates need to prepare for the mediation if they are to be effective advocates. Knowing your client's objectives and goals is the start to developing any mediation strategy. Advocates should verify that the necessary persons on both sides of the case will attend the mediation and are available for the entire mediation. It is very important that both the advocate and their client have all necessary information including documents, reports and depositions at the mediation. A lack of vital information can stop a mediation dead in its tracks.

The advocate should develop a strategy as to how they would like the mediation to proceed. This strategy could include:

- Whether the advocate should talk to the mediator before the mediation
- The mediation statement to be submitted
- Information needed by the other party
- Opening statement comments to be made by the lawyer and their client
- Agenda items for the caucuses
- The nature and extent of any discussions outside of caucus and the opening session
- How the mediator can help you at the mediation
- What problems are anticipated at the mediation (i.e., multi-party issues, poor communication, settlement value, emotional issues).

This list of topics is by no means exhaustive but hopefully illustrates why an advocate needs to prepare and strategize for the mediation. By anticipating and devising different approaches for these and other mediation scenarios, an advocate will be more effective at the mediation.

Communicating Effectively at the Mediation

Although mediation advocacy is different than trial advocacy, it also requires meticulous preparation and thought to be effective. Unlike trial where the advocate's focus is a neutral jury, at mediation the focus is your adversary. An advocate must utilize different advocacy techniques and approaches to be effective at mediation.

Initially, it should be noted that effective listening is an integral part of mediation advocacy. Good listening requires using your ears and eyes so you can understand the complete picture presented by your opponent. Empathetic and reflective listening are both effective listening techniques that can create a better communication atmosphere at mediation.

Nonverbal communication is another important communication tool for mediation advocates. Good nonverbal communication requires appropriate eye contact as well as proper facial movements, hand gestures and body postures. Advocates should refresh their understanding of effective listening techniques as well as nonverbal communication skills. Practice and review of these skills will ensure an advocate's basic mastery of them for use in mediation.

Of equal importance to advocates is the specific words and language that they use at mediation. An advocate's proper choice of words is crucial in crafting an effective mediation theme. Advocates should avoid adversarial remarks and conduct as much as possible at mediation. Such remarks will generally increase any polarization between the parties and may escalate the dispute. If an apology or admission is to be conveyed at the mediation, it too must be properly worded and conveyed or it may have the opposite effect than was intended. Certain qualifier words like "but," "always" and "never" should be used cautiously since they often cloud your message. Additionally try to use descriptive not judgmental language. For example say, "You have not received medical treatment for the last year," versus "You are no longer injured." Improperly worded messages may not only fail to persuade your opponent but could also further antagonize them.

Another area that mediation advocates should become more familiar with is persuasion motivation. Studies have shown that people are more likely to be persuaded to change their views when presented with accurate information even if it conflicts with their social views or personal beliefs. Interestingly, mediations are more successful when a better understanding of the case by the parties emerges as a result of effective communication. This increased understanding usually results in parties being more confident about what is in their best interests. This confidence can empower parties to settle their case.

Effective mediation advocates recognize that mediation is probably the best opportunity to persuade the opponent on the facts and issues of the claim and the fairness of their settlement position. An advocate should continuously reassess his case and reexamine the reasoning throughout the mediation. By utilizing these communication techniques and approaches, an advocate should be more effective at mediation.

Presenting Your Opening Statement

An opening statement is a great opportunity for the mediation advocate to persuade the other party and establish a productive atmosphere. On occasion at mediation, the parties may want to skip the opening statement, believing that it is not necessary. The opening general session is crucial to setting the tone, objectives and ground rules for the mediation. Generally the opening session should not be waived. Rather, it can be tailored to accommodate specific concerns of the parties. An opening statement should be carefully prepared and skillfully presented with a definite theme and purpose. A less formal, if not conversational approach, is generally used versus a "trial opening statement." Where appropriate, exhibits in the way of pictures, documents or depositions excerpts can be incorporated in the presentation.

Before beginning the presentation, the advocate should acknowledge or recognize remarks made by opposing counsel or his client. For example, an advocate might comment on how difficult it was for the injured plaintiff to recover from injuries or admit liability for the claim. In the appropriate case, an apology, expression of regret or condolence can be extended to the other party. Such acknowledgements can change the whole tone of the mediation and often lead to better listening and understanding by the parties.

During the opening statement, an advocate should stay focused on the theme and goals. By stating the case in a persuasive, professional and candid manner, the advocate will increase his chance of persuading the opponent of the risks of the claim. The advocate should consider asking or answering questions during the opening session if it will be helpful for the case. Parties or representatives should make some comments during the opening session. For example, plaintiffs could read from a prepared statement. This keeps them focused on their message and avoids creating further problems by saying "the wrong thing." Similarly, an insurance adjuster could summarize how the claim was reviewed by the insurance company claims committee, discussed with an attorney, and that they are at the mediation to try and settle the claim. Guided or limited participation by parties during the opening session can help reduce everyone's anxiety and create a good atmosphere for effective communication between the parties.

Caucus Strategies

After opening statement, there is generally caucusing with all parties separately by the mediator. Normally the caucuses are confidential so that there can be candid discussions with the mediator. Advocates should discuss with their clients what happened in opening session while waiting for their turn to caucus. During caucus the advocate should anticipate discussing the facts, legal issues and case strengths and weaknesses as well as any other statements or questions of the client with the mediator. Advocates should be ready for the mediator to play "devil's advocate" during the caucus as well as raise other matters for them to consider. An advocate should have objectives for the caucuses and attempt to learn from the mediator during caucus. For example, a mediator might be asked about settlement value or told of confidential information of various kinds (i.e., surveillance video tape or witness statement). These disclosures often help the advocate to better understand and evaluate the case.

The advocate should be proactive throughout the mediation. Direct communication between the parties or the attorneys should be considered after caucusing. Direct candid communication can be one of the most effective means of persuading your opponent and his client. It also gives you additional opportunities to observe and evaluate the other side. Advocates can always suggest ideas to the mediator to present to the other party. Remember that the mediator's main function at mediation is to facilitate the negotiation. A good mediator will be eager to try ideas that might further narrow the settlement range and achieve your mediation objectives.

Dealing with Impasse

Most mediations progress leading to an eventual resolution of the case. Some mediations do reach an impasse. However, even when an impasse appears imminent, you should continue your efforts to resolve the claim. Sometimes just staying and working at the mediation will allow you to breakthrough the impasse. An experienced and persistent mediator can propose different

approaches to deal with an impasse (i.e. mediator's proposal, attorney only caucus, etc). Of course, advocates should also discuss with the mediator any ideas they have to deal with the impasse. Simply observing that your adversary is not leaving the mediation might tell you that there is more progress that can be made at the mediation.

If further efforts lead to a settlement, the parties should prepare and sign a short agreement that confirms the settlement terms. A written settlement agreement protects all parties from ambiguous settlement terms or recanting of the settlement. A formal final settlement agreement and release can be executed later. Where a true impasse occurs, the advocate should make sure the opponent understands the final settlement offer or message. If the offer is to be withdrawn or has a time deadline that must be clearly communicated. Conversely, if there is a desire to continue negotiations with or without the mediator following the mediation, then that also needs to be clearly communicated. Every effort should be made to end the mediation on a congenial basis if possible, even if there is dissatisfaction with the outcome. Advocates should consider following up with the mediator after the mediation to discuss renewing settlement discussions.

Final Thoughts

As advocates become more skilled and experienced in mediation advocacy, mediation should become an even more valuable process for litigators to achieve their client's goals and objectives. The informal mediation forum with its confidential protection presents different settlement opportunities than litigation for the creative and skilled advocate. Effective mediation advocacy requires specific communication techniques and approaches throughout the mediation. Moreover, an advocate should utilize the mediator as much as possible to facilitate the resolution of the dispute.

Hopefully this article has provided advocates with some useful approaches to implement at mediation. There is great potential for advocates to develop their advocacy skills to provide their clients with an effective alternative to litigation in resolving disputes. Mediation advocacy skills should be taught and recognized as both necessary but different from trial advocacy skills. An advocate who masters both of these skills will be a formidable advocate for his client.