Effective Mediation and Settlement Techniques: How Do You Convince the Other Side It's Wrong?

Tips from the Trenches for an Effective Mediation

Ronald Jay Cohen[1]
Raymond A. Garcia[2]
Hon. Karen Wells Roby[3]
Elizabeth T. Timkovich[4]

What do you do when you have a case you think should and could settle, if only opposing counsel—or more often, his client—had a more realistic view of the value (or lack thereof) of his case? Even though you might prefer to avoid the expense of mediation, it could well be your best solution. A good, impartial mediator—especially if he or she has the clout of being a sitting or former judge—may be able to point your opponent to the weaknesses in his case more effectively and believably than can you.

To that end, below are ten practical tips for making mediation as effective as possible.

1. **Prepare your client as thoroughly as if for deposition or trial.**

Preparing your client in advance of mediation is essential. Many lawyers devote countless hours to witness deposition and trial preparation, each of which is important and often justifiable. Preparation of clients for mediation demands nearly equal commitment. The mediation process and regimen are foreign to most clients, and orienting them to expected procedures and techniques is critical to promoting a successful mediation.

Thoroughly discuss the good facts and bad facts with the client representative who will be at the mediation. Also, prepare the client for the legal discussion that may ensue so that he or she does not feel excluded or like some inexperienced person in relation to the legal issues.

[1] Ron Cohen is the founding partner of Cohen Kennedy Dowd & Quigley, P.C. in Phoenix, Arizona.
[2] Ray Garcia is the founding principal of Garcia & Milas, P.C. in New Haven, Connecticut.
[3] Judge Karen Roby is a U.S. Magistrate Judge for the U.S. District Court, Eastern District of Louisiana.
[4] Elizabeth Timkovich is a litigation partner with the firm of Winston & Strawn, LLP in Charlotte, North Carolina.

2. Promote reasonable client expectations.

It is important for your client to understand both the strengths *and* weaknesses of his or her case, as well as the best-case and worst-case outcomes should the case proceed to trial. This involves a thorough discussion of likely attorney fees and costs through the lifetime of the case, potential *realistic* damages awards, plus potential reputational risks. With those in mind, discuss with your client the range of acceptable results, modeling if possible the range of acceptable results against overall litigation expense. Prepare your client to compromise, and not hold out for an unrealistic result. You may need to present your client with legal research illustrating actual damages awards in cases similar to or stronger than yours. Your client should go into mediation with an already established idea of how low he or she is willing to go (if the plaintiff), or how high (if the defendant), in order to be done with the case.

3. Think beyond just the economics.

In helping your client determine the range of acceptable outcomes, do not focus only on money, to the exclusion of other forms of consideration. What are your client's non-economic goals and concerns, if any? Does your opponent have any non-economic pressure points you can use to your advantage? For instance, your client or opponent may be willing to sacrifice a certain amount of money in exchange for other settlement conditions, such as confidentiality, non-disparagement, use of intellectual property, non-competition, exclusivity, credit corrections, time constraints or extensions, etc.

Make sure you and your client develop a clear mutual understanding of any reputational concerns your client may have. What will be the effect, if any, of prosecuting the case to completion on the perception of the client in the market place? How does the client view the effect of that perception, and is he or she willing to pay more to avoid it? These are questions you should ask and answer before embarking on mediation.

4. Prepare a thorough mediation briefing book.

Most mediated cases occur when the lawyers have an ample understanding of the key facts and law upon which the opposing litigant(s) principally rely. Where time and the economies permit, each major fact, opinion and legal position should be identified in a briefing book and then critically dissected and destroyed. An executive summary of why the opponent's position is wrong should follow each identified issue, accompanied by authority in support of your position, including case law, discovery material, documents and expert opinions. This briefing book both prepares counsel for dialogue with the mediator and provides immediate access to ready ammunition that, perhaps, the mediator can use with the other side.

5. Consider submitting a confidential mediation brief.

Many mediations include the submission of briefs, often exchanged with the other participants. Obtaining the consent of the mediator to file a short, confidential brief can be an essential tool for the mediator and a meaningful assistance to the process. Such a brief can orient the mediator to the relationships of the parties, of counsel, to certain sensitive obstacles to settlement, etc.

The decision whether to share your pre-mediation brief with opposing counsel—and not just the mediator—should probably be determined on a case-by-case basis. You may, for instance, choose to come right out and acknowledge to the mediator certain obvious weaknesses in your case that motivate you to settle, whereas you would not want to share that concession with your opponent. In other instances, it could help you strategically to share with opposing counsel the strengths of your case, along with supporting legal references. This strategic decision depends, among other things, on how strong your case presents itself on paper and on your read of opposing counsel.

6. Make effective use of technology.

Consider the use of technology as an additional means of communicating your client's position to the mediator and during the parties' opening meeting. If the mediator permits it, a PowerPoint illustrating your case's key strengths, your opponent's key weaknesses, and particularly helpful documents or case law can be an effective tool in

setting the tone for the day. Avoid the temptation, though, to engage in oral argument. Remember: The goal of the day is settlement, not to obtain a dispositive court ruling.

Also consider bringing with you to mediation a laptop containing key documents from your case file, along with a projector so that those documents can be pulled up and shared as needed.

7. Recognize the mediator's primary goal: settlement.

A skilled mediator will be prepared to expose the weaknesses of your case and trumpet the strengths of your opponent's case. Part of the value of mediation is to learn what a neutral thinks of your case and, absent settlement, improve your advocacy as a result. Yet mediation participants frequently are seduced into argument and wide swings of emotion by engaging in passionate debate with the mediator, trying to persuade him or her of the verity of their cases. Remember, the mediator uses such a process to fertilize flexibility towards settlement and really does not generally invest in the merits of the case. A mediator's success is measured by whether settlement is achieved, and it is healthy to be cautious before putting too much value in a mediator's reaction to your claims or defenses.

Along this same vein, do not ask the mediator where he or she thinks the case may settle. Remember that the mediator's role is to move the parties to a number that both parties find reasonable under the circumstances.

8. Consider the mediator your jury.

Do not miss an opportunity to "educate" the mediator on the facts and legal principles that apply to the case in the simplest terms possible. Every point of contact should be oriented toward providing information beneficial to the case, and or demonstrating the weaknesses of the opposition.

9. Listen and observe.

Do not focus just on presenting your position during mediation; it is equally important to listen to the mediator and opposing counsel, and pay attention to their visual cues. Try to dispel the kind of emotional reactions that will inhibit good listening and observation skills. Be mindful that people listen with a certain ear, based on point of view, inbred biases and other external motivations that often stilt or prevent one from "hearing" what someone across the table is saying. If you do not pay enough attention to determine what it is the other sides really wants, you are unlikely to achieve a mutual agreement.

10. Stay the course.

Finally, be prepared for the highs and lows. The vagaries of a day or two of mediation often include deep discouragement or reckless optimism. Stay the course of the process and do not let a momentary emotion overcome your better judgment.