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Create Your Own Mediation Countdown

Some time ago I wrote an article suggesting that we might optimize our chances for settling at mediation if we adopted a "MOO" – a Mediation Optimization Order – that mimics a trial order with specified tasks to be performed 30, 60 or 90 days prior to a mediation session. See "The Litigator's Guide to Successful Mediation Advocacy: The Case for Mediation Optimization Orders," For the Defense, March 2012. There are things to be done to maximize your chances of settling, but those "to do" items are not widely articulated in articles or CLE materials, and courts are reluctant to require preparation for mediation – although the lack of preparation is at the root cause of many cases that impasse.

Mediation is often described as a "break" from the litigation and that mindset (suggestive of a holiday) is not always conducive to careful mediation planning by the lawyer and client. Unfortunately, because the mediation process itself has few formal rules and mandatory prerequisites, this may explain why there are no pre-mediation standards of practice that are religiously followed and why earnest and specific mediation preparation is often lacking. After all, it is easy for the demands and deadlines attendant to litigation to monopolize one's time.

To steer your mediation toward success and, hopefully, settlement, adopt a MOO or create your own mediation time line as if there was a court order governing pre-mediation activity. Schedule telephone calls to all opposing attorneys *two or three months* prior to the mediation to find out who is, and, most importantly, who *is not* attending. (You need key decision-makers, not placeholders). At a minimum, give or get a demand at least *thirty days prior* to mediation. Be persistent.

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If you cannot get a demand from plaintiff's counsel, that may be an indicator of a lack of client control or unpreparedness.

In multi-party cases, figure out where the obstacles to settlement lie. Try to determine what a multi-party funding arrangement might look like before mediation starts. Host a "defense only" conference call before mediation. Pre-mediation discussions may also reveal the existence of third parties to be joined or insurance coverage problems in another camp that could detrimentally impact the mediation. You may find there are others whose involvement is necessary to achieve a settlement. Don't discover coverage problems or parties on the day of mediation. Focusing on your client's wants and needs is too simplistic. Try to identify non-economic terms the parties may want or need. The truly effective mediation advocate knows if the other parties are ready to mediate, how the other parties are likely to behave, and which party may be the most difficult player before entering the room.

If you have a corporate client, make sure you have the true and best voice of the company. If your client has unrealistic expectations, better to flush that out weeks prior to mediation than the day before. The only way to do that is to start the dialogue early. Sometimes client goals and expectations change and it is only on the eve of mediation we learn of those changes.

Why is preparation so important? Because some problems are not fixable on the day of mediation. Preparation helps mold expectations which make consensus at mediation easier to achieve. What if the case that doesn't settle becomes a sinkhole of activity? For many clients, settling a case could be the difference between a good year and financial hardship. Data tells us two percent of the filed civil cases go to trial and approximately 90 percent of the cases that survive a motion to dismiss go to mediation. Everyone acknowledges that mediation is the most *efficient* mechanism for resolving a case, so it stands to reason that your time, training and attention should be invested in optimizing results in an event occurring 90 percent of the time, while the two percent problem can wait for later.

So the next time you schedule a mediation, start calendaring specific pre-mediation activity that will optimize the mediation process. Your task should be to create your own pre-mediation countdown and undertake those tasks with the same adherence you would under a trial order. If we treated mediation like trial and an impasse as the intellectual equivalent of a mistrial, our preparation and attention would be keener. Good preparation is also billable and benefits the client. Good preparation and early communication allows us to anticipate, and, hopefully, rectify impediments to settlement that might otherwise lead to impasse.

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