Top 10 Mistakes to Avoid Making in Mediation Advocacy

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2013-07-29 12:00:00 AM

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At lunch, you tell her about the mediation you just came from. As you had anticipated, the case did not settle. The parties were too far apart, and the mediation was a waste of time. You explain that you had thoroughly researched the law, and felt reasonably confident that a court would find for your client. In your opening statement, you presented many of the arguments you would be providing at court, so the other side would know what it was up against — but when opposing counsel offered a significantly lower amount than you felt the case was worth, you informed the mediator that further discussion would be fruitless, and you and your client walked out.

You know Jane has resolved many seemingly intractable cases in mediation, and you ask her what she thinks you might have done differently. She responds with a litany of mistakes she has seen mediation advocates make that have hampered her past mediations.

1. The wrong mindset. Mediation is a different dispute resolution process than litigation. Approaching a problem-solving process like mediation with a litigator's mindset is certain to cause problems. Instead, understanding and respecting the differences between the processes, and adjusting your mindset — and your client's — for participating in mediation is a giant step in the right direction.

2. Improper preparation. Mediation preparation is substantially different from trial preparation. While the facts and legal merits certainly have their place in a mediation, you must come to the mediation with a clear grasp of your client's interests and priorities. Mediation also requires that you try to anticipate the other side's interests and priorities, and that you discuss possible options for satisfying the parties' interests with your client and review alternatives if the mediation proves unsuccessful.

3. Inappropriate tone. A forceful tone rarely works in a mediation, since it will likely incite the other party and impair the dialogue. Likewise, insulting or offensive remarks and ultimatums have no place in mediation. To achieve the best results, your tone should be conciliatory, understanding and respectful of the other side, in order to diffuse any emotions and lead to a productive dialogue.

4. Improper focus on legal merit and dollar value. Many litigators make the mistake of focusing on the law, who is at fault and the damages that a court might award. In mediation, your focus should be on the parties' interests and creative options for resolving the dispute and moving forward. Fault should take a back seat to a solution that is agreeable to both parties. Future business arrangements, apologies, payment plans and other options that are outside the realm of remedies available in court are not only fair

game, they are often essential to reaching a resolution in mediation.

5. Giving up too soon. Mediation takes time and often progresses through many small movements. The gap between the parties' initial offers is not a good indicator of whether a dispute is likely to be resolved in mediation. You also need to trust the mediator to use appropriate tactics and skills to help the parties reach an agreement.

6. Stifling the client. Often, clients can explain their side of the story in a way that is more convincing to the other party than their attorneys can, since the clients were the ones impacted by the circumstances that gave rise to the dispute, and will continue to be impacted if the case does not settle. Letting your client speak may help forge a genuine connection with the other party that can promote a dialogue. The parties are also in the best position to help the mediator understand their interests and concerns, enabling the mediator to better assist the parties. Further, allowing clients to speak their piece alleviates some of their frustration and anger, causing them to be more open to listening to the other side and considering creative options, and it leads to greater buy-in in the ultimate resolution.

7. Mismanaging emotion. Both parties often bring their emotions into the mediation. Emotions are healthy, and should be viewed as an opportunity to gain insight into a party's concerns, allowing for the development of options. Inappropriately responding to the other party's emotions can impair the chances of having a fruitful discussion, whereas responding appropriately to emotions can build trust and rapport, both of which are key to obtaining resolution.

8. The wrong people at the table. A critical factor in mediation is having representatives of comparable status with settlement authority present for each party. If one party is represented by its president and the other by a midlevel manager, the president may perceive that the other side is not serious about resolving the dispute, and be less inclined to negotiate with them.

9. Missing information. Occasionally a mediation stalls — or fails — because one party needs information to properly assess a settlement offer. For instance, a supplier may want to obtain a company's records related to damages the company claims it incurred as a result of the supplier's breach of contract. The mediator can facilitate obtaining the information so that the mediation stays on course.

10. Not properly utilizing the mediator. Mediators have skills and tools to help parties achieve a resolution. The more familiar you are with the ways to use the mediator effectively, the more likely the dispute will be resolved. For instance, the mediator can make a proposal to the other side that the proposer wants them to consider — as if coming from the mediator — so that it is not discounted as coming from the opponent.

After listening to Jane, you realize that you made several of these errors, and perhaps you ought to give mediation another try. You call the client and obtain their approval for another mediation session, after which you contact opposing counsel and the mediator to schedule another session.

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