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How to Prepare for and Handle Difficult Mediations

Why are some mediations more difficult than others? What are the factors that typically increase the difficulty of mediating certain cases? And how can lawyers better prepare their clients and themselves for those difficult mediations? In this article, I will offer some suggestions so that you and your client can do a better job at your next mediation. And in the following article, I will show how these suggestions can be applied in preparing to mediate a non-compete case and a probate dispute.

I. Contributing Factors

There are many factors that increase the difficulty of a mediation. Sometimes the personality of a party poses problems for his own lawyer as well as for opposing counsel. Very often the characteristics that have enabled a person to succeed in life or in business are contrary to the approach that's needed to resolve a dispute productively and efficiently, or, at least, to obtain the best offer from the other side at mediation so that a more informed decision can be made about the risk of litigation.

A. Personality Traits, Business Success, and Mediation

For example, while single-minded focus and tenacity are frequently cited as valuable personality traits for success, mediation often requires the party to think more broadly about the dispute and to consider more fully the strengths of the other party's legal positions, the evidence supporting his opponent's case, and the very real possibility that the litigation will last longer than anticipated or that the trial will not go as planned. Or maybe a party finds himself in the middle of a lawsuit because of a lack of focus, general tentativeness, or indecision; all of those traits will also undermine that party's ability to prepare properly for the mediation, communicate goals effectively to his lawyer and the mediator, and execute an effective negotiation strategy at the mediation.

B. Essential Questions to be Asked When Analyzing Your Case

Before a mediation, the party and his lawyer should ask and consider the following questions:

"What is the purpose of the mediation – to settle or to obtain information?"

"What have we learned in discovery and in motion practice?"

"What are we missing in discovery?"

"How is our theory of the case holding up?"

"What is the true strength of our legal position?"

"What if this case lasts longer than anticipated and becomes more expensive?"

"What will have to be done if we lose the trial?"

Finally and most important: "What is the value of the case right now?"

C. The History or Relationship of the Parties, and Bad Blood

Other times mediations get bogged down because the parties had a long, close working relationship, during which important friendships were established, but that working relationship has deteriorated or been destroyed, and it has fallen to the lawyers to sort through the remains to determine whether money is owed. Those dynamics are prevalent in cases involving a non-compete clause, where the former employee tends to view her success as being the natural by-product of hard work and skill, while the former employer views that same success as being attributable to the employee's receipt of proper training and access to business connections, all of which should flow back to the employer. There are difficult mediations in which the parties are related ***and*** did business together, until things did not go as planned. Or maybe a dispute has erupted over the proper division of a deceased relative's estate or assets. Some claims, such as fraud, are inherently difficult because allegations of dishonesty and lack of candor strike at the heart of another party's character. And, finally, there are those difficult situations when (believe it or not) the attorneys' litigating styles simply aren't compatible or when the attorneys just can't stand each other, much less get along.

D. Attorneys' Fees as a Primary Factor

One or more of these factors are typically prevalent in difficult mediations and can cloud a party and his lawyer's ability to accurately assess the present value of a future outcome. But perhaps the most difficult mediations are those in which attorneys'

fees have unfortunately taken center stage, either because the fees incurred are greater than the amount that is realistically at issue, or because the attorneys' fees are being taken out of a common fund (such as an estate) and will soon become larger than the amount in dispute. The dilemma presented by larger-than-projected attorneys' fees typically exacerbates other factors and makes for a long day, for the lawyer, for opposing counsel and her client, and for the mediator. The following suggestions will help you prepare for those difficult mediations.

II. Recognition of the Problem

Although this might seem obvious, it is worth a reminder: Before calling or meeting with a client to discuss an upcoming mediation, the lawyer should rigorously examine the file to determine how the case was initially presented to the lawyer. What facts were known and, just as important, what facts were unknown at the beginning? This examination should be performed with the understanding that clients are not always able to provide their lawyers with the evidence that is necessary for counsel to formulate a well-reasoned evaluation of the case. The lawyer should also examine what has taken place in discovery or through motion practice which may have changed the amount realistically at issue, and the complexity and the projected length of the case. And finally the lawyer should calculate the amount of attorneys' fees that have been incurred and paid to date. Without this up-to-date information, the lawyer and his clients might become distracted by their own different, imperfect, and often self-serving memories of what has occurred since the case began; avoiding this distraction will enable the lawyer and client to better prepare for the mediation.

II. Examples of Difficult Mediations

Above, I discussed factors, such as personality traits, which can increase the difficulty of a mediation; essential questions to be considered during the pre-mediation meeting; the complicating factor of the increased attorneys' fees relative to the amount in controversy; and how the lawyer can better discuss these factors with the client. The following two examples will illustrate how this advice can be applied to specific situations.

A. Example 1 – The Non-compete Case

Let's look at a non-compete case. The employer calls her lawyer and states that a top salesperson has left the company to work for a competitor and has taken a significant number of customers. This conduct violated the non-compete clause in the salesperson's contract, which also includes a prevailing party attorneys' fees clause. Computer records have revealed that the former employee had been planning to leave for months and attempted to convince other salespeople to join him at the new company. At the moment, none of the other salespeople have left, but some customers are gone and sales are down. Estimated, quantifiable damages attributable to the former employee's departure are approximately $50,000, and other losses are projected, including reputational damage.

The lawyer meets with the employer and outlines the range of options, from writing a demand letter to immediately filing a complaint accompanied by a motion for a temporary injunction. The employer is worried about the long-term impact the departure will have on the company and is especially angry because the former employee had just received a more lucrative compensation package and was given greater responsibility with other employees shortly before leaving. The employer decides to file suit without moving for a temporary injunction. Initial discovery looks promising for the employer, so depositions are taken. It quickly becomes evident that the former employee hadn't fully revealed to his new employer the extent of his pre-departure planning. At the same time, the employer has managed to salvage some of the customer relationships. An analysis of damages reveals that the employer has actually sustained damages which are approximately $20,000 to $22,500, or less than ½ of the first projection. Plus, the former employee now has

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fewer assets than he had months earlier. The employer's attorneys' fees and costs are $25,000 going into the mediation. The parties decide to mediate prior to intense trial preparation.

B. Example 2 – A Probate Dispute

Or examine a dispute between siblings involving an estate. The surviving parent – the mother – has died, leaving a son and a daughter, and named her lawyer as the personal representative of the estate. The son and daughter got along reasonably well as they were growing up as siblings, but they drifted apart. The son is a small business owner, who lived within a mile of his parents and spent significant time with them as they aged, and even more time with his mother as her health declined, while his sister lived out of state and concentrated on her career as a dermatologist. The father stated during a few of the son's visits that he wanted the homestead to stay in the family.

Their parents' house, valued at $210,000, is the primary asset of the estate, but there is a mortgage with $90,000 remaining and a $50,000 home equity loan which was taken out to pay for the mother's long-term care, leaving approximately $70,000 in equity. There is also a bank account with approximately $80,000. The mother's last will and testament splits her assets evenly between her son and daughter, but the provision dealing with the homestead is ambiguous. The son, who just completed a contentious divorce, believes that his father's intention regarding the homestead amounted to a promise that he would get the home, particularly since his sister lives out of state. The daughter's husband, however, is convinced that his brother-in-law misused the power of attorney he was given over the parents' joint bank account to pay for his own living expenses during the divorce proceedings.

Despite the personal representative's admirable efforts, litigation was filed in the mother's estate, first by the sister (with her husband's encouragement) requesting an accounting of the bank account and the funds from the home equity loan, then a counterclaim by the brother claiming his right to the home. The personal representative had sought to avoid the added expense of engaging a litigator by meeting separately with the son and then the daughter, but the claims necessitated that she engage a litigator. In their initial meeting, the litigator suggested an early mediation.

IV. Suggestions for Difficult Mediations

As with any negotiation, the lawyers in the non-compete case and the probate dispute need to speak with their clients and prepare an effective strategy for the mediation. This requires the lawyer and client to examine the amount of attorneys' fees and costs already incurred and paid; add the estimated fees and litigation costs through trial, and possibly through appeal; and then objectively evaluate the evidence as currently known to determine the likelihood of prevailing, the possibility of losing at trial, the practical implications of a "win" and a "loss," and the possibility of a split verdict or ruling from the bench; and consider the economic and non-economic costs of continued litigation. These factors will be viewed differently by each client depending on his/her particular circumstances and his/her tolerance of risk.

When discussing legal expenses, both the lawyer and the client should understand that at the beginning of most lawsuits there are typically so many unknown factors that it is very difficult to accurately assess the value of a case through trial. One experienced mediator described it this way, "At the beginning of the case the lawyer is looking through a periscope, at the end you're looking at it through a microscope." As difficult as it might be, the client should generally look upon money already spent on attorneys' fees as just one of the factors in determining the current value of the case – despite the possibility of recovering fees through a contract or statute – as recovering fees is often an uncertain and difficult proposition and requires a solvent adversary. The client, in an effort not to "throw good money after bad," should also consider whether there are other, better uses for the funds to be expended on litigation costs going forward. Similarly, the client should also consider the lost opportunity costs of continuing with litigation.

This analysis will assist the lawyer and client with preparing a clear-eyed assessment of the ***current value of the case*** – not the perceived value of the case when it was filed, or the hoped-for value of the case at some future date, premised upon evidence that has not yet been discovered or developed. ***But what is the case worth at the time of the mediation?***

By using this type of approach, the lawyer can counsel her employer/client in the non-compete case to consider accepting a smaller amount than the initial projection of $50,000 without feeling like the case was a loss. The filing of the lawsuit and the expenditure of funds on attorneys' fees enabled the company to understand that the damages were not as large as initially projected and salvaging relationships with customers had value.

Similarly, in the probate dispute, both the brother and the sister would be well advised to accept a compromise, rather than take to trial a case for a fully audited accounting of the debits from the bank account and the son's entitlement to the homestead. If the homestead's $70,000 in equity is divided equally, the brother and sister will receive $35,000; the $80,000 bank account will result in $40,000 per child. Unless the son's claim to the homestead is very strong, it would not make good sense for the son to reject an even remotely reasonable settlement offer in order to take the case to trial, particularly since the very funds needed to pay the mortgage and the home equity loan would be redirected towards the attorneys' fees and costs of both trial counsel and the personal representative. The daughter would face the same dilemma with her claim for an accounting of the bank account, as it is an asset of the estate.

Conclusion

Before speaking with your client in anticipation of an upcoming mediation, remember to thoroughly examine the file; determine which facts were known and which were not known when the case began; figure out how the case has changed as evidence has been discovered; calculate the attorneys' fees and costs that have been incurred and will be incurred; and formulate an opinion about the current value of the case. Following these steps will enable you to have a more informed conversation with your client about what to expect at the mediation and where your client's final offer should be, and you will be in a better position to discuss and avoid those difficult moments when the issue of attorneys' fees takes on unwarranted focus. Your clients will appreciate the extra preparation, and you can assist them in obtaining a better result at mediation.

Frank Bedell, Esq., offers mediation, arbitration, and settlement counsel services for commercial clients in Orlando and throughout Florida. He was a commercial and probate trial lawyer for 25+ years before concentrating in dispute resolution. Frank is a past president of the Orange County Bar Association and has been a member of the OCBA since 1987.