

Effective Advocacy In Mediation

Richard M. Borchers

President

Legal Resolution Center

Mediation and settlement conferences are often ordered by trial courts. This section will explore ways to make the most out of any conference, even if counsel believe that settlement is impossible.

What are the goals for the settlement conference? Whether a settlement conference or mediation is being held pursuant to court order or by agreement, each side should set goals for the conference. Though settlement may be the desired result, it may or may not occur during the conference. Other goals can and should be set by the parties or counsel for the parties.

One goal that needs to be discussed is whether the mediator or settlement judge will be requested or allowed to comment on the merits of the case. Mediation can be pursued with the goal that the parties will arrive at a resolution, but only with the facilitation of the mediator. In other words, the mediator will not express any personal thoughts about the strengths and weaknesses of the case. Both sides will need to agree on this approach. A second goal may be to allow the parties a chance to express themselves to the mediator and, if agreed upon, to the opposing party. If the case settles, then the conference will be the closest the parties get to the courtroom and their day in court. With large business entities on both sides of a case, this may not be an important part of the case. For private individuals, the opportunity to share frustrations and thoughts about the case is important.

A third goal is to be educated concerning the opposing party's claims and/or defenses. Part of the conference process should allow the sharing of each side's theories about the case. This requires that each side be open about claims and defenses. Often such a sharing will make the opposing party reconsider a position.

A fourth goal is to seek an independent view of the merits of the case. Parties must agree to allow the mediator to share his or her thoughts on the case. A mediator's view

of a case will provide an independent evaluation, but it is also simply the best evaluation that person can provide as to the likely outcome of the matter. Once that independent evaluation is provided, it must be analyzed along with all other information available.

A fifth goal should be to set some time parameters for the conference. A conference scheduled by a state judicial officer will have limitations due to docket pressure. With a private mediator, setting a goal of resolution within a given number of hours or days will help focus the settlement agenda. It also will focus the parties in dealing with what is important.

A sixth goal may be to arrive at an understanding as to how the conference process is to proceed. Often mediators have a method or style that they use, but the parties should have some input. As an example, some conferences should not be held with a joint meeting at the beginning because of feelings that may exist. If a mediator uses a format of separating the parties from the beginning, that may not be helpful to the parties. The goal of setting the process will require coordination with the mediator.

A seventh goal may be education of a party or parties. A client who has unreasonable expectations needs to hear what weaknesses exist from a neutral source. That neutral source must be willing to share his or her thoughts. A straight mediation process with no input will not work in such cases.

Selection of a Mediator. In a conference ordered by the court, there may be a selection of the person to conduct the mediation. For instance, a district judge may refer the case to another district judge in a different district. In this instance, the analysis then needs to be undertaken as to that person and what his or her approach will be at the conference. In other words, you may have to restructure how you will proceed based upon the person who will preside over the conference.

If there is no preselection of the mediator, then the parties can begin the process to select the person. There are a number of considerations that should be examined:

1. Do the parties desire to have a mediator with prior judicial background? In some cases, judicial experience is important, as the parties may give greater credence to that person's evaluation of the case.

2. Do the parties desire to have an attorney who has specialized knowledge of a certain area of the law? A lawyer with years of experience in a specialized area, such as probate or workmen's compensation, will not have to educate himself or herself and will be able to explain to a party the nuances of that specialized area of the law.
3. Do the parties desire to have an attorney or judge involved at all? A domestic case in which child custody or visitation is at issue may be resolved faster and cheaper by a social worker or other mental health professional.
4. How much time and money should be invested in the mediation process? Some cases are doomed to proceed to trial no matter who may be the mediator. Each side has to determine the cost-benefit analysis and select a mediator with this factor in mind.
5. What process is to be used by a proposed mediator and will it work with these parties?
6. Is it desirable to have a mediator from outside of the community or from the immediate community?
7. Will the proposed mediator change the process if the parties request?

Once these points have been evaluated, the selection of the mediator can be completed. It is important for both sides to feel comfortable with the chosen mediator.

The Confidential Settlement Statement: Almost all mediators request a confidential settlement statement or similar document before the conference. It is important to consider how to prepare that statement to insure its most effective use at the mediation. It is important to consider who will be reading the statement. In a mediation with a district judge, consider how much time that judge will have to read the materials that you provide with the confidential statement. If you know that the judge will not have the time to read all of the materials, then provide a more compact statement and select the materials that are crucial for an evaluation of the case.

If you use a private mediator who is being paid by the hour, then you have a right to expect that all materials will be read. You also can expect to be charged for that reading. It is again important to determine what is important and what is not. Submitting all medical records on a personal injury case may not be an effective use of the

mediator's time, if only one-half of the records deal with injuries arising from an accident.

Be candid and straightforward in the confidential statement. Set forth strengths and weaknesses of your case. Detail the best and worst case scenarios from your evaluation of the evidence.

If the client has unrealistic expectations, then set that forth directly or indirectly. If you provide a copy of the statement to the client, then detail the client's expectations separately from your evaluation. This will be a red flag to the mediator that the client may be out of control or has unrealistic and unobtainable expectations.

If you want the mediator to express an opinion on any aspect of the case, including pending motions, please set that forth in the statement. The mediator can be evaluating those areas before the conference and will be prepared to discuss them.

Please be sure to provide the mediator with the confidential statement well in advance of the conference. It is appropriate to have the statement at least seven days before the conference.

Preparation for the Conference: Prior to the conference, it is important to review your confidential statement. If there are any errors or changes, provide that to the mediator at the beginning of the conference. For instance, information that a surgery will not occur based upon a recent doctor's visit is important for the mediator to know.

Prepare the client for the conference. Discuss with the client who the mediator will be. Talk candidly about the mediator's strengths and weaknesses. Tell the client what can be expected. If the mediator will ask the client to discuss the case directly, prepare the client for that. Explain to the client the process that will be used by the mediator. If the client is troubled by the process (i.e., everyone in the same room at the beginning), then explore what would make the client more comfortable.

Prepare the client for the worst. If you expect the case to settle and it does not, then the client will be unhappy. The client will feel better if advised that settlement may not occur, and it should be assumed that it will not. It should never be assumed that a settlement will be reached in any case.

The Conference: Settlement and mediation conferences can never be scripted. There is an ebb and flow that must take place.

You have a right to certain expectations from the mediator. You and the client should expect to be treated with respect. You should expect that the mediator will have read the materials that you and the opposing party submitted. You should expect that your time will not be wasted by the mediator and/or the process. If the case hits an impasse and does not move beyond that impasse within a reasonable period of time, then the conference should end.

If you have limited time, then make the most of it. Please remember that the conference may set the stage for the case settling at a later date. Try not to draw "lines in the sand." Please encourage the client to listen carefully to the mediator's comments and those of the opposing party. If the case needs to be re-evaluated by the client, then the settlement conference is a good place to do that.

After the Conference: If you want the mediator to continue to be involved by telephone or otherwise, make sure that is discussed before the conference ends. This will mean also discussing the financial obligations of that continued involvement.

Be willing to re-evaluate the case after the conference. If a subsequent conference would be helpful, then propose that to the other side.

If a subsequent conference is held, discuss with opposing counsel whether a different mediator would be helpful. If the previous mediator was not effective, then do not be afraid to make a change to someone else.