Educate, Explore and Engage: Pointers for Lawyers Preparing Clients for Facilitative Mediation

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I attended the Alternative Dispute Resolution (ADR) Section of the State Bar of Michigan held its annual meeting in early October 2015 in Traverse City, Michigan. During session discussions, ADR practitioners swapped stories about successful outcomes and frequent frustrations. A common complaint was the lack of preparedness of the parties, leading to the perception that clients who were better educated about the process and what to expect made for more efficient mediations and higher success rates.

This article is offered as a reminder to counsel not only to prepare yourself for mediation, but to assure your client is ready to participate by implementing the following themes: Educate your client; Explore with your client, and Engage your client.

A. EDUCATE YOUR CLIENT ABOUT THE PROCESS

The client will be a more effective participant when she knows what to expect, what the objective is, and how to achieve it. Sometimes we find that attorneys don't fully explain to their clients the distinctions among litigation, arbitration, case evaluation and facilitative mediation, let alone the different techniques that mediators employ.

Explain the following features of facilitative mediation:
• It is not final and binding;
• The mediator has no power to punish;
• The mediator has solely one function – to help the parties settle; • Plenary (common) sessions and private (caucus) sessions;

• The process is confidential;
• No information disclosed or statements made are admissible in court.

The reason for the last two points is to encourage candor. Positions may be taken, concessions made, values attached and even apologies offered in order to facilitate the negotiation without fear that they will later undermine the client's case.

Nonetheless, the client can expect gamesmanship, frustration, maybe some anger (e.g., when the client hears the opponent's opening offer/demand), and more than a little disappointment along

the way. The client should expect the opponent and his counsel to be having similar reactions in their caucus room. Educate the client that the success rate for mediation is high and the general feedback from parties is that the process was worthwhile, even if not immediately successful.

Be patient.

Educate the client about your mediator. Certainly, if you have not worked with this mediator before, educate yourself about her techniques. During the pre-session telephone conference, you can ask questions directly to the mediator in order to then properly educate your client. Advise the client to be prepared for the mediator to express confidence in and be a champion for his case, and then come back to poke holes and cast doubt about its value. The mediator is not being duplicitous, but is playing devil's advocate as she is doing in the other room. The client would come to realize that on his own, but will be more comfortable and engaged if prepared for the exercise through your role-playing in advance of mediation.

As part of the role-playing preparation, educate the client about how the opponent is assessing the case and placing values on its different issues. Prepare a game plan for reaching a realistic settlement value, and then prepare Plan B. Even before the client asks, and certainly before the mediator raises it, educate the client about the cost, distraction and risks of not settling through mediation and proceeding to trial.

Emphasize that the mediation is not about trial lawyer advocacy or vanquishing the opponent. Resolving a dispute is usually good for you and your client. As Abraham Lincoln said: "As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." As counsel, your best service is to help the mediator help the clients to settle their case. The battle will resume if you cannot settle through mediation.

B. EXPLORE THE CLIENT'S FEARS AND EXPECTATIONS

Explore with the client the recesses and crevices of the case and her feelings about it and the other side. As counsel, you might sense such hostility and distrust that the plenary session should be truncated or the process would be better served by starting the day in separate sessions. But don't gravitate to that conclusion too quickly. Explore further. How can we work to restore enough trust to negotiate effectively? You might also learn that your client has unreasonable expectations about the prospect of salvaging a relationship with the opponent.

This exercise is not to prepare the client for some cathartic experience. It is partially to assure that you as lawyer do not learn an important obstacle or lever for the first time during the mediation; although it is not necessarily a bad thing if you do.

A favorite example with a happy ending was the case between a small family owned supplier of automotive components to OEMs (Co. "A"), and a multinational manufacturer of consumer goods (Co. "B"), who wanted to try out its product expertise in the automotive market. In the second year of the relationship, B terminated the contract; A cried foul and sued for breach. The divisive forces of litigation took hold, positions hardened, and the chances for constructive dialogue between the parties diminished.

Within the first hour of mediation during the plenary session, A's young, second generation CEO voiced his belief that B, who had come to the dance with A, must have met someone else there (a

competitor of A) and went home with that more attractive partner. This was the first anyone in the room, including A's CFO and its counsel, had heard about these suspicions.

B sincerely apologized for any misunderstanding, and explained that its project team had realized that the automotive market was outside of B's core competency. Thus, B severed the relationship as best it could under the contract and without causing too much disruption to A's supply chain. A, who had interpreted this break-up as a cynical version of "Really, it's not you, it's me," requested a one-on-one meeting with B's executive, and the case settled before lunch.

This "happy ending" example contains several lessons for preparing the client for mediation. While the spontaneity of A's revelation may have spurred the candid discourse that led to settlement, without counsel's advance awareness and ability to prepare, we can imagine scenarios how it instead could have gone badly.

The role of "apology" should never be underestimated, even in a business dispute. Explore with the client whether an apology from the opponent would be meaningful, or whether one from the client would be forthcoming if helpful to the process. Attention to the details of empathy – having you and your client step into other side's shoes – can pay important dividends.

As the mediator, I learned from this example the potential of the plenary session where the parties, rather than their counsel, are actively engaged. The example also illustrates the value of alternative settings for negotiation in addition to the plenary and caucus sessions. The client should be prepared to understand how separate discussions between the clients, with or without counsel, or with or without the mediator, can break through barriers and facilitate progress.

Other areas to explore are sensitive topics or "hot buttons" about which the mediator should be aware, including any cultural customs or protocols. Inadvertent offense by the mediator or the other side can impede progress.

And, of course, does the client have full discretionary authority or is there a necessary stamp of approval (i.e., from a governing board) in order to seal the deal? Understand the procedures and how long it takes so everyone is on the same page before starting the session.

Review in advance with the client the elements of a prospective settlement agreement, including the boilerplate that is often taken for granted. Some parties will have predispositions or regulatory requirements about confidentiality and disclosure of settlement terms that can throw a wrench in the works if not discussed until all other terms have been hammered out.

C. ENGAGE THE CLIENT TO ACTIVELY PARTICIPATE

While not literally so, facilitative mediation affords your client's most meaningful "day in court" to tell its story, unrestrained by the rules of evidence and risks of cross examination. Plus, as shown by the above example, the benefits can be immediate. Rehearse the client's story. Review the contexts in which it might be most effectively presented. Is this a situation where the client's message should be conveyed face-to- face (most likely), or is the parties' relationship so strained that it will be better communicated with the mediator's deft touch?

Remind the client that her target audience is not the mediator, but the other side, which presents another opportunity to exercise empathy. Simply to ask the client how the adversary is likely to

react to the client's message probably will not yield a helpful response. Explore with more probing and specific questions.

- How did the dispute get started?
- Why did it accelerate or fester?
- Was it through neglect, or is there an antagonist?
- Who is viewed here as the victim, and why?
- What might have been done to avoid the divide and its deepening?
- What are the benefits and downsides of settling?
- Whose interests are served by continuing the fight, and why?
- What is needed in a settlement to satisfy the interests at stake?

These types of questions may not have much use or relevance to how the issues will be presented at trial, but they are central to the mediation process. By asking your client to answer these questions thoughtfully from both her and the opponent's perspective, empathy is actively cultivated and common ground should come to the surface. These will be the building blocks for a productive mediation.

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