Preparing Your Client for Mediation

Presented by Adam Kutinsky
Dawda Mann

I. What is Mediation?

95% of cases settle before trial. Within the past couple of decades, there has been a huge push within the legal profession to facilitate settlement through Alternative Dispute Resolution (ADR). Mediation or facilitation, which I will use interchangeably in this presentation, is a non-binding form of ADR as opposed to arbitration (fully binding) and case evaluation (quasi-binding).

The legal profession's push to facilitate every case is overkill. Now, nearly every case filed in state circuit court is not only assigned to case evaluation under MCR 2.403, but frequently ordered to facilitation. The result is additional fees and costs associated with facilitation if the case is not appropriate for facilitation. More significant, however, is a loss of trial skills among young lawyers. Certainly, the uncertainties of trial make settlement very attractive, but certain cases should go to trial and the overwhelming preference among courts to facilitate settlements has resulted in less trials. Anecdotally, next time you have a chance to ask a judge the make up of their trials in 2014, you will find that nearly every trial they presided over was a PIP case. Earlier this year I attended an event where the keynote speaker was a Justice of the Supreme Court who was a former trial judge. He indicated that the greatest thing he misses from his role as a trial judge was witnessing a great trial attorney take over the courtroom and jury. Maybe we should ask ourselves as trial attorneys why it is that we are so opposed to trying cases?

As an example of the over-facilitation phenomenon, the business court docket now requires early facilitation for all cases within 90 days of the first court conference (local administrative orders). This means that as soon as you file your lawsuit, the Court calls the parties in for a scheduling conference and orders the case to facilitation before any significant discovery has been taken. As discussed below, I do not recommend every case for early pre-discovery facilitation, although, some cases can benefit from this. For these and other reasons, I would recommend not agreeing to facilitate every case, but to first make a well-reasoned decision whether or not your particular lawsuit is appropriate for facilitation.

Mediation and facilitation should be distinguished from case evaluation and arbitration. Case evaluation is mandatory for all lawsuits other than those that are only equitable in nature. As you know, case evaluation is

governed by the Michigan Court Rules and is only binding when all parties to the evaluation process "accept" the evaluation award. If any party "rejects" the award, the case proceeds to trial as normal.

There is a risk of sanctions in rejecting an award in the form of attorney fees and costs from the date of rejection through verdict. Conversely, arbitration is a binding ADR proceeding conducted like a bench trial, but not governed by evidentiary rules. Rather, either a single arbitrator or panel of arbitrators presides over the proceedings and makes decisions concerning admissibility of evidence, usually under the American Arbitration Association rules. The arbitration award is then entered as a judgment following the proceedings.

II. Why Choose Mediation?

Each case is different and as indicated before, not every case is appropriate for mediation. Timing is also important to consider. Again, the business docket for example, orders every case to early facilitation, which means that the parties are engaged in ADR before significant discovery has been conducted. This can be very ineffective because parties tend to be entrenched in their positions early on in cases because discovery has not yet revealed weaknesses in their case.

Nevertheless, small business disputes, such as commercial collection actions, can benefit greatly from early facilitation. This is is because small disputes make parties reasonably concerned about excessive attorney fees, the bulk of which are incurred during the discovery period. Additionally, in small disputes, the economic damages are more easily measurable without extensive discovery.

On the other hand, I do not recommend submitting a case to early facilitation where the parties lack the details necessary to make a reasonable settlement offer or demand. In other words, if you require discovery to understand the range of economic damages or validity of the opposing parties' defenses, it makes no sense to submit the case to facilitation early on in the lawsuit. Since facilitation is much more time consuming than case evaluation, an ineffective mediation session can anger a client since he is not only spending his time away from work and paying your fees, but he is also paying for the facilitator.

When called into the judge's chambers and asked whether early facilitation is appropriate, do not hesitate to say no if the case requires discovery before facilitation can be effective. In my experience, facilitation after discovery is much more effective in nearly every case since by that time the parties possess sufficient information to evaluate the strengths and weaknesses of their cases.

Another benefit of facilitation is that you can use it to avoid case evaluation, which I hate. There is nothing more frustrating than attempting to sum up a complex dispute in 5 minutes to three mediators that have several other cases they are evaluating on that same day. So, usually when the judge asks whether facilitation is warranted, I will ask that as part of the order to facilitate, he remove the case from case evaluation. I will say, however, that if you are handling a commercial dispute, you will likely be given special attention by the panel since it may be the only non-PIP case they have that day.

III. ***Choosing the Right Mediator****.*

Mediators come in all shapes and sizes. I would classify most mediators in three categories:

1. *The retired judge*. Nearly every retired judge becomes a mediator and many of them are very effective. However, most of these mediators have not been formally trained – rather, they use their status as a retired judge to establish a rapport with the parties and coax them into settlement.

2. *Formally trained attorney mediators*. Many attorneys have spent years refining the art of facilitation. They have likely gone through the training offered by the American Arbitration Association or ICLE and possess certifications from these organizations.

3. *Untrained but experienced attorney mediators*. Many of these mediators are very effective, especially if they are practitioners in the area of law that the case involves. For example, construction lien cases involve very unique issues of mortgage and lien priority which are implicated by extensive statutory and common law. Only certain mediators are qualified to handle complex construction lien cases and many of them are neither former judges nor certified by an association.

If you are handling a smaller case, you should be cognizant of the mediator's fees. You will likely not need a powerhouse mediator that charges $400 per hour to settle your $15,000 District Court collection action. Rather, all you probably need to do is get the parties together in a couple of conference rooms and send numbers back and forth. There are plenty of inexpensive mediators that may not fall within the above categories but will serve the purpose of settling your smaller case.

The type of case is also important to consider when selecting mediators. I have made the mistake of mediating a commercial contract dispute with a

mediator primarily experienced in personal injury matters. He was not nearly as effective in resolving the case as someone who specializes in commercial disputes. In fact, that same case was submitted to a different more qualified facilitator a few months later and settled. So, the parties ended up paying twice as much to settle a case at mediation by failing to identify the appropriate mediator for the particular case.

This occurred again last year on a very complex insurance coverage dispute submitted to a retired judge that had no specialized experience or training in insurance coverage. He spent a ½ day attempting to settle the case unsuccessfully. A few months latter, the same case was submitted to a different facilitator that got it settled.

You will almost always be handed a list of recommended mediators from your judge at the status conference. I recommend going through the list with opposing counsel and identifying at least 3 mediators that you both recognize. Then, contact other attorneys you trust in the area of law that you practice in and investigate their success with the identified mediators. Once you have properly investigated the mediator, consult with your client about the mediator's fees and give your recommendation.

For what its worth, here is my list of recommended mediators:

Commercial Disputes:

John Sier
Kevin Hendrick
Thomas Hardy
Peter Kupelian
Martin Weisman

Personal Injury:

Martin Waldman
Stuart Fraser
Hon. James Rashid

If you are a young attorney that does not work at a large firm, feel free to contact me by phone or email and I will give you my recommendations for mediators on any particular case that you have.

IV. ***Drafting a Mediation Summary*.**

Be concise and precise (also good advice in writing trial motions).

Do not submit lengthy facilitation summaries with a ton of case law. Submitting an "appellate brief" type summary is a rookie mistake and a total waste of time. If you select the right mediator for your case, they will already know the applicable law and will just need the facts and arguments from you. On the other hand, if you are dealing with an unusual legal issue, you should include a summary of the law with applicable case cites and a concise analysis of your position. I have heard this explained in many different ways from many different attorneys and judges during my 15 years in practice. Once, I was berated by a senior attorney for "not respecting people's time" when he proofread a long letter I wrote to a client. Another time, I was mocked by a trial judge at a settlement conference when he pulled out my motion and pointed out that I included both a summary of the case and a statement of facts, which in his mind were the exact same thing.

Your mediation summary should concisely and immediately emphasize the facts that support your case, your strongest legal arguments, and an attachment of exhibits in support of both. You will also need to anticipate the strongest arguments of the opposing side and be sure to provide an adequate response to each. This may sound like common sense, but it is the way you present the facts, law and arguments that makes the difference. Being concise and precise is probably the best sign of an effective attorney. Being long-winded and redundant is the sign of an inexperienced attorney and has the effect of irritating the facilitator (and the trial judge).

Personally, I believe that most mediators just need a few strong arguments coupled with facts or other evidence to use as a hammer against the other side. In my experience, mediators use the best information given by the parties to soften the settlement position of the opposite side. Therefore, be sure to provide the mediator with the ammunition to use against your opponent in the form of a strong concise mediation brief that identifies why you will win at trial and include copies of the records, transcripts and other evidence that he can touch, taste and feel. Do not bury the ammunition he needs in a lengthy brief.

V. Preparing the Client for Mediation.

Mediation is one of the few events in litigation that requires your client to spend a significant amount of time their attorney (along with the initial interview, deposition preparation and trial). And this means that while you may not make or break the case at mediation, you can certainly make or break the client relationship.

The facilitator is very aware of the initial impression that he makes on the client – this is evident by his "opening session" where he explains the

process and emphasizes his vast experience in litigation. This is done to set the stage for his "war stories" told to your client in an effort to soften his settlement position. Retired judges are very effective at this strategy, which is something to consider in selecting a mediator for a case you have involving an intransigent client. It is always amazing seeing an ex-judge repeat something to your client that you have told them several times, yet witnessing your client actually hear and understand it for the first time simply because it is being communicated by a retired judge.

So, just as it is part of the mediator's job to make a strong and positive impression on your client, it is also your job to make a strong a positive impression on your client.

With this in mind, the best advice for preparing your client is to first prepare yourself. Begin with a comprehensive analysis of the case. Where are you in the litigation and what have you learned through discovery? Similar to a typical mediation summary, you will need to advise the client on the following general areas:

1. Known facts
2. Disputed facts
3. Liability
4. Damages
5. Defenses

When you discuss each of these areas with your client keep in mind that you are a counselor in addition to being an attorney. When advising a client, do not tell the client what he or she *wants* to hear – Rather, tell the client what he or she *needs* to hear about the case. In particular, the specific strengths and the specific weaknesses of the case. If there is a smoking gun, take it out and show it to the client. Discuss how the weaknesses will be portrayed at trial and how the mediator will use the weakness to soften up the client's settlement position. Play "devil's advocate" for the client and prepare him or her for some tough confrontation with the mediator.

Preparing your client for mediation should involve the elimination of the element of surprise. This means having tough discussions with your client about the problems they have with their case. If you are uncomfortable making a direct statement about a weakness in the case, then tell your client that you "are playing devils advocate" or "the mediator's job is to beat us up and this is what he will likely say".

As for damages, be sure to discuss the range of settlement with the client. Find out what the client believes is the appropriate settlement number. If the client is a defendant and does not believe he or she should pay any

money, then you probably should not be facilitating the case. Conversely, if your client believes that he is entitled to a settlement amount that is so far beyond the realm of reasonableness, facilitation will be ineffective. Blackboard the numbers for the client and discuss what the real exposure is at trial, the cost and expense of preparing for and taking the case through verdict, and what he or she believes would be a reasonable range of settlement amount to discuss at facilitation.

Impress your client with how well you know the facts, how well you know the other side's strategy, what you believe the reasonable range of settlement value is, and how

VI. Handling Insurance Coverage.

Lets assume for a moment that you do not represent an insurance company in a first party dispute. Rather, you represent an insured party in litigation. You may be hired by the insurance company to represent its insured or you may have been hired by the insured and you are also dealing with its insurance coverage. This 3 party relationship of client – insurance company – defense attorney is referred to as the tripartite relationship and frequently creates some ethical dilemmas.

Usually, the dilemma arises when the defense attorney gets caught in the middle of a coverage dispute between the insurance company and its insured defendant. The good news for the assigned defense attorney in this situation is that there is one simple rule to follow – the insured is your client and not the insurance company. Additionally, if you are hired by the insurance company to represent the insured in the case, do not get involved in any discussions concerning insurance coverage. That would be a serious conflict of interest and a guaranteed ethical dilemma.

On the other hand, if there is no dispute over coverage, i.e., the insurance company has agreed that they must pay for the settlement amount at facilitation, you will need to involve the insurance company representative in every stage of facilitation and most likely will require that insurance representative to attend facilitation or with the court's authorization allow them to be available by telephone during the proceedings.

VII. Handling the Mediation Session.

Before mediation, you should determine how the specific mediator handles his sessions. This would include the opening session and whether the facilitator puts all of the parties in a room together, provides a synopsis of who he is and what the purpose of facilitation is. After this

initial introductory session, which nearly every facilitator does, some facilitators allow the attorneys to present an opening statement.

The importance of knowing whether you will need to present such a statement is that you will be presenting it in front of your client and in front of the opposing parties. Therefore, you are tasked with demonstrating your knowledge, confidence and advocacy skills to your client as well as presenting the strength of your case and your skills and aggressiveness to the opposing parties for the first time.

Be prepared for this or risk looking very foolish and embarrassing yourself and your client. Following the opening session, the facilitator will either break the parties up into separate rooms and then shuttle between the rooms in an effort to settle the case, or he will keep the parties in a room and discuss the case with them all together. I have found that the latter is unusual and rarely effective. Rather, keeping the parties together for an extended session usually ends with raised voices and angry parties. This is probably why most facilitators don't do it.

In my experience, facilitation can be very helpful to a case even if it does not result in settlement. This is because the facilitator will deliver the most damaging evidence and arguments to you and your client in an effort to break you down. Take very detailed notes during this time because it is a window into the thought process of the opposing side. They have given their best arguments to the mediator to be communicated to you, so you will walk out of the facilitation with very helpful information to further develop your case.

If you have a skilled mediator, he will know how to handle your client. Occasionally, a mediator will ask to speak with you without the client to determine what a particular sticking point may be and whether he needs to deliver some bitter pill to the client to push them along to settlement. Use your best judgment in this situation – I would not always recommend exposing your client to a pushy mediator unless it is absolutely necessary. Otherwise, your client may feel thrown under the bus. After all, part of your job is to counsel your client about the best course of action and a mediator should not have to do that for you.

VIII. Settlement Posturing.

One of the first attorneys that I worked for told me that a party's first settlement is either twice as much as they would likely accept or ½ as much as they would likely pay. I cannot say that I have ever scientifically tested this theory but from an anecdotal standpoint, I cannot say it is not generally accurate. At mediation, the parties will usually start out very

far apart. The mediator is aware of that and will deal with it appropriately.

One mediator once told me that the opening offer sets the tone of the negotiations and can lead to a quick resolution if the parties have a good faith offer or demand at the outset. This tends to make sense since the parties always come in much higher or much lower than their final numbers and there is plenty of room to negotiate. Coming in at a number within the range of settlement but not within the range of being insulting is probably the best course of action.

As the session goes on, you will see a pattern develop of how the parties are moving towards one another. At some point, you will realize that the end point is predictable and may want to inform the mediator if that predictable end point is outside the range of your settlement authority. He can then attempt to fix it. If you truly trust your mediator and you are close enough to settlement, you can even give him your final settlement number and tell him to get to that point the best that he can. If he is skilled enough, he may even save you some money.

IX. Negotiating Terms of the Settlement Agreement.

I would recommend drafting the settlement agreement before facilitation. This is because settlement may be at the end of the day and the parties are tired and ready to leave before the settlement agreement signed.

My last two large mediations resulted in settlement after some of the parties and the attorneys had already left making it nearly impossible to add certain provisions into the settlement. You should advise the mediator of any specific provisions, such as confidentiality, mutual release, or waiver of future benefits in PIP cases very early on in the session.

Most facilitations do not result in a full and final settlement agreement and release, but instead have a short form facilitation settlement agreement or term sheet signed by the lawyers with a provision to execute a standard settlement agreement and release at a later date.

However, the basic provisions every settlement agreement at facilitation should have are the amount of the settlement, how it will be paid, when it will be paid, the nature of the release, i.e., unilateral or mutual, the effective dates of the release, and the parties. Any other provisions that you want to include should be communicated to the mediator early on, otherwise he will simply focus on the amount of the settlement and date of release. Also, most facilitation settlement agreements will include a

provision that the matter will go back to the mediator in the event of a dispute.

If you represent an insurance company or the mediator is aware that your client has insurance, I would be wary of this provision. I say this because it is very easy for the mediator to just resolve a small financial dispute by making the insurance company pay. In that respect, it is the best course of action in all litigation to keep the insurance coverage in the background at all times – after all, the amount of insurance coverage is not relevant to the merits of the case.

X. Settlement Negotiations Involving the Mediator After an Unsuccessful Mediation.

A good mediator will continue working with the parties to resolve the case following facilitation even if the case does not settle on the date of facilitation. These types of cases are usually larger commercial cases involving several issues that need to be resolved before settlement can be accomplished. I have found certain mediators uniquely skilled at this particular task.