



The Voice of the Defense Bar



The Business Suit

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Committee News

Mentoring Committee: Young Lawyer's Guide to Being a Superstar in Mediation

by David Henry



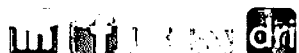
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There can be little doubt that mediation will continue to be a frequent if not mandatory feature of the commercial litigation process in nearly every state. While some states have already embraced mediation as a routine practice, some jurisdictions fail to utilize this process on a consistent basis in state and federal court. Where mediation is less common the training needed and "lawyering" attendant to that process is likely to be inconsistent. Within the skill-set of litigators, mediation preparation and advocacy is oftentimes an area for improvement. This is in part because the mediation process does not depend upon the application of fact to the law, rules of procedure or precedent – none of the bread and butter material comprising a typical law school education.

Mediation does not depend on the art of lawyering in the ordinary sense. Unlike the big budget production that is trial, mediation is more akin to unscripted improvisation without elaborate rule-driven staging, dialogue, and legal analysis. Mediation for purposes of this article, means putting the key decision-makers for the parties in a room with a trained mediator who operates as facilitator, nay-sayer, truth-tester, and champion for settlement. The mediator asks the parties to share information, explore varied and often contrary or conflicting interests, separates needs from wants and helps structure deals. Because there are no hard and fast rules and because mediation training is limited younger litigators are not usually well-prepared to be great mediation advocates.

Whether preparing for a mediation you are handling yourself or if you are assisting more senior counsel, here are some critical suggestions which will ready you and the client for the mediation session. All of these activities are rightfully billable as they help increase the chances of resolution.

1. Make sure you have the best voice and final decision-maker in attendance and that all parties have key decision-makers. Call and tell opposing counsel you intend to bring a key decision maker and you expect the same. No place holders. Mediations that lack key decision makers are more likely to result in an impasse.
2. Create a comprehensive suit report 45-60 days before mediation to include a future budget to

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designated milestones: summary judgment, mediation and trial. Include the good, bad, ugly and what other options exist if any for resolving the case short of mediation.

3. Solicit a premediation demand and statement from other parties. This way if they fail to provide one and hit you with a nasty surprise you have an out for yourself and insulated the firm from criticism – as your client may have expected clairvoyance. If they did not share new and material information in their premediation statement how can you be faulted for not knowing this in advance?

4. Find a mediator the other side respects. It's not important that he be your favorite mediator but that the other side respects his message in private session

5. Make sure the non-economic terms of the deal do not become a distraction. Focus on the money first. If there are other parts of the deal leave those until the end. (A good mediator will steer you this way)

6. Understand that everyone needs an exit strategy that works, economically, intellectually and emotionally. If you insist on capitulation by the other side you are doomed to impasse.

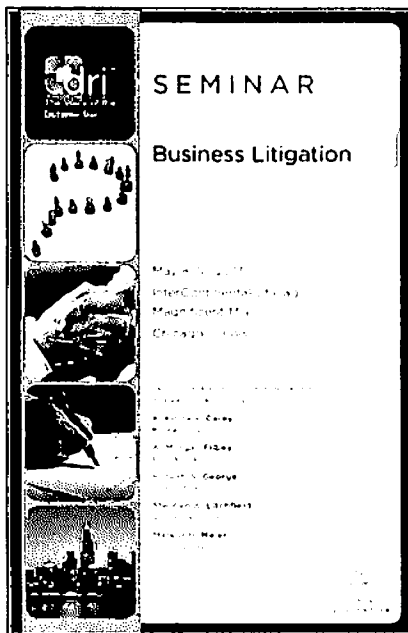
7. Require the parties to disclose any non-party who or which may be in attendance as expert, advisor or consultant at the mediation. Seek out any true legal objection to participation if challenged. (Mediation rules differ in jurisdictions regarding participation by non-parties). So long as the participant is subject to confidentiality, non-parties should be permitted to appear.

8. In multi-party cases the defense lawyers should meet and confer with the clients (and insurers) to consider litigation funding arrangements and pro rata contributions that may be required to resolve the case prior to the formal mediation session. Agreements are not likely to be reached prior to mediation but you will have started advancing the discussions.

9. Advise the client in writing of any recent material developments that may influence the time of trial, cost or case value.

10. Schedule the mediation with sufficient time afterwards if needed to conduct discovery after the mediation session ends. In the absence of settlement, many times you will learn new information that leads to additional discovery.

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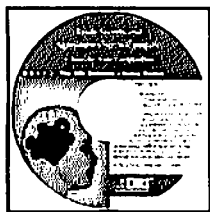
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Settlements at mediation do not happen by accident. Poorly planned mediations and unprepared lawyers cause clients to question their choice of counsel. Thoughtful and timely preparation is the key but due to scheduling pressures, mediation preparation can be overlooked. Mediation has the power to resolve complicated disputes in an expeditious and highly efficient manner. Cases that might take years to resolve by litigation can be resolved by a mediated settlement in a single day. Litigators that embrace mediation as a tool for dispute resolution and who are capable of performing well in that arena will engender client confidence and afford the



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client the best possible opportunity to reach a resolution that satisfies their economic and business objectives.

About the Author

David Henry is partner at Alvarez Sambol & Winthrop in Orlando, Florida. He is the immediate past chair of the ADR Committee of the Florida Defense Lawyers Association and is a frequent presenter for the DRI and to state and local bar and insurance organizations across the United States.

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