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## LITIGATORS CORNER: How to Make Effective Use of a Mediation



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Once upon a time, we tried to avoid mediation. Our goal was simply to get to trial as quickly as we could. But since the passage of the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651, courts began to adopt alternative dispute resolution procedures, such as early neutral evaluation, mediation, mini-trials, and arbitrations. As one example, the Northern District of Ohio has two local rules governing

mediation and arbitration, Local Rules 16.6 and 16.7 respectively. Under Rule 16.6, the court can select a case for mediation, whether the parties want it or not. Under the same rule, the parties are given a list of mediators to choose from, but may also select someone not on the list, so long as the court approves. One can object to a mediation, but that is probably a bad idea in most cases; one exception might be where expedited relief, such as an injunction or a TRO, is sought. Otherwise, an objection will probably just irritate everyone who has to read it before overruling it.

After going through a number of mediations, our firm's cumulative experience is that they are worth a shot. Some cases do indeed settle. Even if they don't, you at least get to see something of the other side's case. You have a chance to adjust the terrain to your future benefit. Of course, you cannot force the other side to settle, but even so, you can make an impression that may later help you. Here are some factors that I believe contribute to an effective mediation, and so enhance your chance of success.

**(1) Do a good job of the pre-mediation submission.** Most of the mediations I have been involved in required the submission of a confidential statement to the mediator, whether a magistrate judge or a private party. Making a good, readable submission is critical. Don't be argumentative; be factual. Introduce the technical challenge, and then the solution offered by the invention, and don't be afraid to use pictures. Put them in the text, and preferably not in an exhibit buried behind some tab. Address each of the major points: infringement (with sample claims), validity, and damages. Show that you know

what you are doing by taking into account the risks of litigation. Tell the mediator about your client, especially if you are representing an individual, rather than a large company. How long did it take to make the invention? What were the investments? For any exhibits you do use, make them easier to find; use tabs with identifying names on them, not letter tabs.

In one of our cases where we are seeking several hundred million dollars for our client, we started off with the biography of our client, who has sixty patents to his name. We followed that with pictures of the infringing device, and a PowerPoint presentation giving a simplified illustration of the infringement and the prior licenses of the patent. A sophisticated damage analysis was next. We based it on market data, since we had no discovery at that point. We applied interest to past sales revenue, and calculated the present value of future sales. Then we applied a reasonable royalty, since our client did not manufacture the product. But we did not stop there. We accounted for the risks of litigation and the value of certainty in a compromise, and based the ultimate settlement demand on that.

PowerPoint works well for this, because it is easy to show the accused device, and where each element of a claim can be found in the device. Some in our office have used presentations in html, which can of course be run on any web browser. With PowerPoint, you have to be sure the user has PowerPoint, or at least the viewer program. Either one works well, but I recommend that you include paper as well as electronic copies. There is nothing worse than getting to a conference only to learn that your projector doesn't work, or that the mediator in question doesn't know how to use PowerPoint or the browser.

Before doing a submission, it is a good idea to try to get the opposing party to update financial discovery before the submission is due. Don't leave money on the table. If you have to, extrapolate the infringer's sales.

**(2) Have a person with appropriate authority with you at the mediation.** Traipsing off to a mediation without full settlement authority is like invading Iraq without ammunition. This isn't a problem with individual plaintiffs, but I have seen CEOs who are literally afraid of attending a mediation. You must be able to make a quick decision about a counter-offer or an acceptance. Someone from your client's office who is getting telephone reports about the mediation is not going to be able to see the other party, see the mediator, watch facial expressions and body language or hear tones of voice. Conveying this is impossible, and wastes valuable time.

There is another bad consequence that flows from not having the real decision-maker

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at the mediation. In one of our cases, the mediator was a magistrate judge. Our client was repeatedly instructed about the court's requirement that a person will full settlement authority be present. What did our client do? Why, of course, it disobeyed the judge. Our client representative had to call his boss before responding to the defendant's settlement offer. That immediately let the magistrate judge know that he was dealing with nobodies. If you want to be Rodney Dangerfield, go ahead. But don't be surprised if you end up traveling for nothing, and if you are regarded as a messenger boy; that is what you are.

**(3) Prepare your client properly.** Realistic expectations are essential. The damage theory sought by a plaintiff is premised on everything going right. As we all know, the war plan is fine – until the war starts. Then things change. There are risks: years of delay, adverse decisions, appeals, and so forth. A big verdict could bankrupt a defendant, and your plaintiff-client is not going to be a secured creditor.

Your client has to have a realistic appreciation of these risks before going to a mediation, and must understand the advantages of settling versus litigating.

**(4) Don't take a squadron to the mediation.** Let the other side take a squadron.

**(5) Have a settlement agreement, or at least the significant terms, drafted ahead of time.** Think about the terms that might come up at the end of a successful settlement, such as the schedule for any payments, whether there will be interest, what the exclusivity of any license will be, whether there will be a most-favored nations clause, whether there will be confidentiality, what the parties can say publicly, and so forth. If you

think of these only at the last moment, your client might not get the best possible deal.

A good provision to include in any settlement reached during a mediation is that it is a binding, complete settlement. Another provision worth considering is one to the effect that the parties can, by mutual agreement, substitute another settlement document with additional terms agreeable to each. In other words, avoid buyer's remorse.

**(6) Pick an effective mediator.** This is the most important factor. I much prefer to pick a mediator I know, rather than going blind, or using someone from a list. In a case we had in Ohio, we used one of the court's approved mediators. The mediator was very nice, but totally ineffective. He did not challenge the plaintiff on the obvious mismatch between its litigation costs – several hundred thousand dollars – and its damages, which were on the order of twenty to sixty thousand dollars. Our client prepared carefully and went to the mediation with a good proposed redesign; but the mediator did not challenge the plaintiff on why the redesign was not sufficient. The result was a waste of time for the eight people who attended the mediation, six of whom had traveled from out of town.

Cost is not significant if the mediation is effective. I mentioned in an earlier article (*My Wishes for 2003*, February, 2003), a mediator who was stunningly effective. His price was high, but he was worth every penny. He had total command of the facts of each party's position, and was excellent at finding weaknesses in both parties' cases. After a day of jaw-boning, the case settled. He did not let us walk out the door without having a written settlement document, signed by the parties and the lawyers.

We often meet resistance when we propose to use a mediator we have used before; the

paranoid defendant immediately figures we have the fix in. In fact, however, the two best mediators we have seen and used have been equally hard on both sides.

**(7) Check out the mediator's procedures.** If the mediator is a magistrate judge, these are usually available from the court's website.

**(8) Keep good notes of mediations.** There may be more than one attempt at settlement, and it is quite disappointing to see that no one can exactly relate the sequence of offers and counter-offers, their respective terms, and even who was present. Be in command of your facts. Keep some decent notes during a conference, and of the major points made by each party and the mediator. If the mediation is unsuccessful, put your thoughts and recollections on paper immediately afterward. If you go back for round two, you want to be able to say who was there and what was offered. Even if you don't know what you are doing, it will look like you do.

**(9) Put it all under Rule 408.** Some lawyers try to turn settlement discussions into evidence. In my view, that is unethical. In one of our cases, the defendant has served us with requests for admissions, including a request that we admit various facts regarding our client's settlement demand, and the changes in that figure. Mention "Rule 408" and "settlement" in every communication.

In conclusion, there is more than one goal to a mediation. Even if the case does not settle, a mediation still has a goal. Use it to establish a rapport. Let that person who is the mediator put a face to you and to your client. Don't take outlandish positions; they are not likely to succeed and, worse, may damage your credibility. **IPT**