

Substantial Client Counseling Is the Key

Preparing the Client for Mediation

By Daniel R. Cofran, J.D.

Successful mediation requires substantial client counseling in advance. A client not fully *and objectively* knowledgeable about the case can be overly optimistic and unable to “know a good deal when he or she sees one.”

Consider the following . . .

Timing. The client meeting should take place several days before the mediation in case it uncovers the need for additional information or to get different settlement authority from a “higher up.”

How Long? Depending on the case’s complexity, be prepared to spend a half day or more working with the client carefully preparing for the mediation.

Set the Stage. The client needs to understand that mediation is not an adversarial proceeding. The lawyer isn’t there to argue case. The goal isn’t to “win” the mediation. It’s to settle the case.

Explain that the mediator has no decision making power. He or she is there to help the parties reach an agreement in an informal atmosphere. The client always has the final say.

The more comfortable the client is with the process, the more likely he or she will be able to make realistic decisions and get the case settled.

Preview. Go over what to expect during the mediation, including what is known about the mediator’s background and personality and the sequencing of events: mediator discussion of “ground rules,” opening remarks, mediator’s joint session questioning and discussions, separate caucuses and final agreement memorialization if the case settles.

Tell the client that private consultation with counsel during a joint session is entirely appropriate.

Instruct the client to keep



emotions in check, be respectful and listen attentively.

Case Review. This is the meat. Use the meeting for a full review of the case. Cover all controlling facts, determinative issues, strengths, weaknesses, risks, future litigation costs and *realistic* best case/worst case scenarios for *both* the client’s case and the other side’s case.

Human beings by nature are optimistic. A primary goal of the case review is to move the client to objectivity. Be the devil’s advocate. “Present” the other side’s case. The client may be in denial. Brutal honesty may be in order. Provide a candid view of the likelihood of success.

Advise the client that new facts are likely to come out during the mediation that may affect settlement positions.

Confidentiality. The client needs to understand that everything said and done in the mediation is confidential. This will increase his or her comfort level. However, carefully explain any exceptions to confidentiality in the jurisdiction you’re in.

Who’s Talking Now? Generally, the client doesn’t present any of the case or make a statement. The client should understand, however, that the mediator may ask him or her questions. Prepare the client on

anticipated questions.

Be careful if the client wants to “have his say.” It could be emotional and alienate the other side. Dissuade the client from doing this or soften it.

Settlement Proposals. Develop settlement proposals, both an opening offer and what the client thinks he or she ultimately can live with.

Educate the client that overly aggressive opening offers are counterproductive.

Keep discussion of a final position general and open-ended, for example, set a range of figures, so the client isn’t wed to a bottom line. Better yet, instead agree upon basic interests and principles to measure offers against.

Include non-monetary approaches. Encourage the client to think “outside the box.” Parties can agree to relief that a court cannot order, *e.g.*, a more favorable continuing business relationship.

What does the client really want? Work with the client to focus on his or her true *interests* in the case as opposed to the *positions* that simply express the underlying interests. Where’s the pain that drives the position? Similarly, what are the other party’s real *interests*? Good luck!



Dan Cofran, a Best Lawyer in America, has practiced law for 40 years in corporate and commercial litigation, commercial real estate transactions and land use law. He long has been active in Kansas City civic affairs, including service on the Kansas City, Missouri City Council, many civic organization boards and as the recipient of civic honors.