BRAR MEDIATION

Guide to Preparing for Mediation

Jesse S. Brar

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1. Introduction

Mediation is a process where parties meet with a mediator and engage in negotiations that are mediated and facilitated by the mediator. Through these mediated negotiations the parties can reach a settlement and resolution of their disputes. So preparing for mediation is essentially preparing for settlement negotiations with the intention of resolving the dispute. The mediator does not impose a decision on the parties, rather the decisions are made by the parties themselves. The parties to the dispute are the decision makers and thus are able to creatively craft settlement options that can resolve the dispute.

Although for counsel, preparing for mediation is like preparing for trial, however, mediation should not be thought of an adversarial process similar to a trial. For a successful mediation, it is important for counsel and the parties to have the right mindset to negotiate the best possible resolution to the dispute.

2. Understanding the Process of Mediation

Counsel for the parties have probably participated in many mediations and understand the process, the parties, however, may not be familiar with the mediation process. It is important for the parties to understand the difference between the adversarial nature of litigation (trial or arbitration) and the cooperative process of mediation.

Parties should understand the role of the mediator. They should know that the mediator unlike a judge, is not empowered to decide the dispute or decide who is right and who is wrong. Understanding the role of the mediator is likely to make the parties more comfortable with the process, and the parties can more effectively use the mediator in resolving the dispute. Knowing that the mediator will not make the decisions, instead, the decision making power lies with the parties, is likely to result in more creative approaches to the resolution of the dispute.

Also, parties should understand that their counsel would play a different role in mediation than in litigation. For a mediation to be successful, the parties and their counsel should be flexible and conciliatory.

The process of mediation contemplates an open discussion of the issues in dispute, and knowing that the communications in the mediation are confidential, the parties are more likely to engage in the process fully and candidly. It is important for the parties to understand the confidential nature of mediation and that what is said in the mediation cannot be used against the parties later in a proceeding, and the mediator cannot be called to testify. If there is information that the party does not want to disclose to the other side, the mediator will keep that information confidential and not disclose it to the other side.

For the mediation to succeed and for the parties to reach an enduring settlement, the parties must enter the process with an open mind, and participate in the process in good faith.

3. Preparing the Parties

Since mediation is a process where the parties are in control of decision making, the parties play a crucial role in the process, and their participation is fundamental to reaching a lasting settlement of the dispute. The parties have a more active role in mediation as compared to litigation. At times the mediator will speak with the parties directly. So the parties should be prepared to discuss the facts and terms of possible settlement options.

If the party is going to the mediation for the first time, it is important for the party to understand what happens during the mediation. They should know who will be attending the mediation on both sides. For example, they should know if, in addition to the counsel and other party, any expert witnesses (if any) or insurance adjuster, or another professional or support personnel will be there.

The some of the parties may not be aware of the logistics of the process. It is a good idea to prepare the parties for how the negotiations in mediations proceed, and how to respond to certain offers they may find out of the range, etc. Parties should be prepared

for the mediation session to go well into the evening depending on the progress of negotiations.

4. Preparing the Mediator

Most mediators prefer to receive mediation briefs or statements that provide them information about the dispute. Mediation briefs are discussed in a separate section below. However, it is a good idea to speak with the mediator about the logistics of mediation. Make the mediator aware of any cultural norms or issues that may be important for the mediator to know before the mediation.

5. Who Should Attend the Mediation

Probably the most important factor that determines the success of mediation is the presence of the people on both sides who have the decision making and final settlement authority. In addition to the parties and their counsel, it is important to have other important individuals who play a crucial role in the decision making process, such as expert witnesses, or other supporting individual who can aid the parties in decision making should be present or easily available by phone.

6. Preparing the Mediator

Parties should exchange the relevant information, especially data such as damage calculations or other voluminous or complex data in advance of the mediation. I encourage parties to bring a draft settlement term sheet that has the standard settlement terms for the type of case at issue. In cases that may have complex terms of the settlement, it might be useful to exchange drafts of those settlement terms. In the interest of saving time and avoid drafting a settlement agreement at the mediation, it might be useful to draft a skeletal settlement agreement before the mediation session.

7. Mediation Briefs

Sending mediation briefs or statements to the mediator is an important opportunity for the parties to educate the mediator about the key aspects of the claims, defenses, and other important matters in the dispute. Preparation of the mediation brief also give the parties and their counsel to gather their thoughts about the issues in dispute; gather the evidence

or documents that are needed for the documents, and think through a plan for the mediation. Parties should send their mediation briefs to the mediator at least five days before the mediation. Include all the relevant information and exhibits that parties believe are important to understanding the issues in the case fully. Generally, the mediation brief should be no longer than15 pages.

Although most mediators leave it to the discretion of the parties whether they share their mediation briefs with the opposing party. It is helpful to the process of mediation if parties share their briefs with each other. The more a party knows how the opposing side views the dispute, the more likely the dispute will be resolved. If there is any information that is truly confidential, the parties can provide that to the mediator in a separate document, or they can tell the mediator during the first opportunity at the mediation. However, if there are confidential matters that a party does not want to share with the opposing party, the party should communicate that the mediator and provide that information to the mediator separately.

Generally, the mediation brief should include the following:

1. Statement of relevant facts and controlling law;
2. Current status of the case;
3. Any expert reports or analysis;
4. Your description of damages and their values;
5. Statement of prior negotiations, if any;
6. Any known or perceived impediments to settlement;
7. Any know or perceived factors that may favor settlement;
8. A list of who will be attending the mediation; their roles, decision-making authority; and their potential impact on the negotiations;
9. A disclosure of confidential or sensitive information;
10. Any unique interests or constraints of the parties that may be relevant to settlement.

8. Know the Facts and the Law

Even though the preparation for mediation is different than that for a trial or other adversarial proceeding, preparation for mediation is just as important as preparing for trial. Counsel and the parties should use the mediation preparation as an opportunity to gather and know the facts and law pertaining to the dispute. Better preparation allows a

party and their counsel to more fully and persuasively present their view of the dispute to the opposing side.

As part of the preparation identify and gather the information relevant to the dispute. This may include the documents such as previous motions and memos, expert reports, or important deposition testimony, etc. Once you have all the information and documents that are needed, focus on the analysis and arguments and analysis that would help the mediator articulate your positions to the opposing side.

Additionally, since parties are intimately familiar with all aspects of the dispute and the facts surrounding the dispute, they are usually in the best position to come up with creative solutions for the resolution of the dispute. The counsel and parties should consider the various non-economic components of a settlement, and evaluate other creative solutions to the dispute.

9. The Joint Session – Opening Statement

Many mediations start with a joint session where both the parties and their counsel are present. In some parts of the country, the mediations are done exclusively in shuttle format, and there is no joint session. A brief joint session may be useful if the parties use it in the spirit of reaching a settlement and not used purely as an attempt to persuade the other side that your position is correct. Because the joint session carries the risk of parties offending each other and even derailing the process of negotiations, I prefer to conduct the mediation in the shuttle format in separate conferences unless the parties feel that a joint session in a particular case can be useful.

If there is a joint session, counsel should be polite and conciliatory in their presentation. You can state your position or view of the case firmly without attacking the other side. It's important to remember that for a negotiation to be successful you can be hard on the issues but be soft on the people.

10. Anticipate the Settlement

Anticipating a settlement focuses the parties on the dynamics of how to resolve the conflict in a way that can result in the best outcome for the parties. In anticipation of settlement,

counsel and parties should devote some thought to the settlement agreement and consider the important terms that need to be part of the settlement agreement.

In most jurisdictions, for the settlement to be enforceable, it must be in writing. Counsel and parties should consider drafting a settlement term sheet that has the standard settlement terms for the type of case at issue and any terms that the parties consider important to the settlement of the dispute. In cases that may have complex terms of the settlement, it might be useful to exchange drafts of those settlement terms.

In the interest of saving time and avoid drafting a settlement agreement at the mediation, it might be useful to draft a skeletal settlement agreement before the mediation session. In every settlement, there are certain elements and noneconomic terms that must be included. For many settlements, these include confidentiality, non-disparagement, releases, obtaining settlement approval by an agency or court (as in FLSA cases), etc.

11. Follow Up

In some cases, an agreement is not reached in the mediation session, but many of these cases settle during follow up by the mediator. After a mediation in which a full agreement was not reached, many mediators and I continue to engage the parties in a dialogue through telephone conferences. And usually, during this follow up process many of the cases settle.

12. Final Thoughts - Leaving in Peace

Successful settlements of almost all disputes result from compromises by parties, and thus parties may leave with not having all their expectations met. And this may cause buyer's remorse after the settlement where both parties feel that they did not get the best possible deal. However, the counsel and parties should remember all the good reasons for which compromises were made during the mediation. Also, remember all the uncertainties and risks of litigation that have been avoided by the settlement; and that the dispute and litigation has been finally concluded.