focus on :: SETTLEMENT

Preparing the Client for the Mediation and Settlement Conference

BY DAVID J. DAMRON

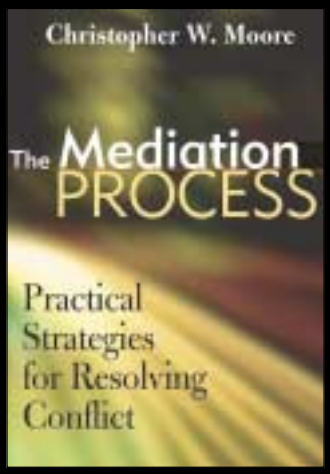
As a mediator and judge *pro tem*, as well as a participant in settlement conferences and mediations, I have seen many resolutions threatened by the failure to prepare clients for the process. Clients need to understand the steps, the roles of the participants and the purpose of mediation and settlement.

Prepare Yourself To Prepare the Client

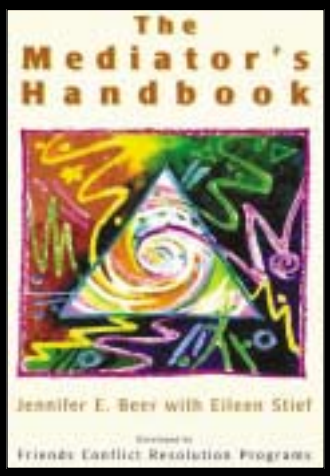
To prepare the client, you the attorney need to be sure that you are prepared for the process. This means understanding the case from both sides. You must know which facts are not disputed, and those that are. Among those facts, which are essential to the case and which are merely anecdotal or incidental? Many times the lawyers have not parsed out which facts are necessary to prove each element of each cause of action that has been alleged. If you think of the jury instructions you would request in the case, those would set forth the elements of each claim or defense. Then you understand where your case is factually and legally strong, and where it is not.

the practitioner's toolbox

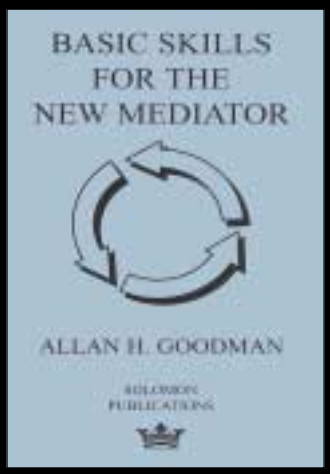
Learning Opportunity: State Bar Convention
ADR: The Advocate's Perspective
Thursday, June 12, 2:00 p.m. – 5:10 p.m.
The Phoenician, Scottsdale
Go to www.azbar.org
The first track of this program focuses on the **Best Practices of Advocacy Techniques in Mediation.** It is targeted to attorneys who want to improve their skills in the mediation of commercial and employment litigation. It will include an interactive "how to do it right" seminar.



The Mediation Process: Practical Strategies for Resolving Conflict (3rd ed.)
by Christopher W. Moore
Jossey-Bass, 2003
464 pages, $35 (paper)
ISBN: 0-78-796446-8
First published in 1986, this is a resource for mediation practitioners in many industries.



The Mediator's Handbook (3rd ed.)
by Jennifer E. Beer and Eileen Stief
New Society, 1997
176 pages, $21.95 (paper)
ISBN: 0-86-571359-6
This book walks the reader through the steps to an effective mediation.



Basic Skills for the New Mediator
by Allen H. Goodman
Solomon Publications, 1994,
111 pages
$25 (paper)
ISBN: 0-96-709730-4
This provides a detailed overview of the mediation process. It answers the 100 questions most frequently asked by new mediators.

Next you need to **understand the damage picture.** Do you have, and have you disclosed, the information necessary to prove the damages or support the relief you are seeking? Do you have the information necessary to disprove or cast doubt on the size or severity of the relief sought if you are defending? To formulate a plan or goal for the settlement process, know what you reasonably hope to achieve if the matter proceeds through the litigation process.

You need to understand what other, similar cases have settled for or comparable jury verdicts have been. This is one of the best ways of managing client expectations.

Now that you understand the case thoroughly, prepare yourself to discuss with the client **what happens if the case does not settle.** The options typically are few: Go to trial (in one form or another such as binding arbitration, short trial or summary jury trial) or walk away from the case. If your client is the defendant, generally the option is the first one: Go to trial.

If you go to trial, what is a reasonable range of verdicts as a result of your experience and research? Certainly there are those cases in which an extraordinary result has been achieved, but what is the range you can reasonably expect? In addition, you need to factor in the cost of trial as one of the risks of not settling the matter. As the claimant, you also want to factor in how long it might take to actually have possession of the relief, whatever or however much it may be. Certainly one may hope to better an offer to settle, but if one has to wait a significant time to achieve that result, it is worth less than an immediate settlement.

Prepare the Client

You and the client must be prepared to work as a team. The settlement judge or mediator will often address questions or comments directly to the client. You do not want your client taken by surprise or unprepared to respond to the questions or comments from the mediator.

First, **the client must understand the process.** Whether a private mediation or a judicial settlement conference, the mechanics of the process are similar. Generally there is a joint meeting with all the parties, followed by private caucuses in which the mediator shuttles between the groups.

Next, **the client must understand the purpose**

of the mediator. The mediator is there to help the parties reach an agreement. She is there to "uncomplicate" things. She is not there as a judge. She does not favor one side over the other and she is not there to determine "right" and "wrong." Typically the mediator will feel free to share whatever she learns from one party with any other party, unless specifically asked to keep something confidential. When requested, the mediator will almost always respect that request.

You and the client must be prepared to work as a team. To formulate a plan or goal for the settlement process, know what you reasonably hope to achieve.

Another important factor for the client to understand is **the confidentiality of the entire process.** In Arizona, there are at least three distinct sources for that confidentiality:

- Rule 16.1 (e), ARIZ.R.CIV.P., requires that the court order confidentiality in settlement conferences.
- A.R.S. § 12-2238, which is located in the "Privileged Communications" portion of the "Courts and Civil Proceedings" section of the Arizona Revised Statutes, states, "The mediation process is confidential."
- Finally, Rule 408 of both the Federal and State Rules of Evidence provides that evidence of offers to compromise and statements made in connection with those offers are not admissible.

It is imperative that clients understand that they are not weakening their litigation positions by participating fully in the settlement process. The client needs to understand that compromises made in the mediation won't come back to haunt them if the case proceeds to trial.

The client must understand that the law seeks to view the facts in an objective sense and seeks to determine what is "relevant" from a legal point of view. Facts that strike the client as compelling and potentially case-dispositive may be legally irrelevant. Furthermore, things that the client "knows" about the adversary and to the client demonstrate why the adversary may be "no good" may not be admissible at all.

A good guide to relevance may be the instructions of law that may be given in a case to a jury. Certainly the Revised Arizona Jury Instructions (RAJI 3d) provide some helpful direction. As an example, jurors are instructed not to be influenced by "sympathy or prejudice," not to "speculate or guess" and to decide the case "only on the evidence produced in court." The RAJIs are likely to contain the elements of the claim or defense applicable to your client. Going through these elements will **help focus the client on the relevant facts** and on what evidence is or is not likely to be admissible.

The client also must be prepared to **understand what the law can or cannot give him.** Legal remedies are generally limited to money in civil cases. The law will not impose a duty on a party to apologize, for example, but that remedy is available by settlement. A party may believe that other remedies should be fairly imposed and not understand that the court cannot give them such a remedy. You and the client need to **understand the remedy the client hopes to achieve** and to determine if that result is available both through litigation and settlement, or if the desired result is achievable only through settlement. Similarly, the client should understand what alternative objective might obtain a similar result.

The facts in the possession of the adversary also need to be discussed. You certainly don't want your client learning for the first time from the adversary or the mediator some damaging fact that you haven't shared with the client. Revelations like that tend to have a polarizing effect and may reduce the confidence your client has in your representation. Furthermore, **make sure the other side has all the information in your possession.** You want the other side to come as prepared as you are. If you have neglected to provide the other side with all the information it needs to fairly evaluate the claim or defense, you can't expect the other side to understand or agree with your positions.

Often the client does not understand how long it might take to realize compensation even if the client prevails in court. Depending on where in the litigation the mediation occurs, literally years can be saved by settlement. A discussion of the many things that must occur even after a jury verdict in order for the client to see some compensation is useful. The notions of post-verdict motions, arguments over forms of judgments, post-judgment relief petitions and appeals should be discussed.

Of course, the worst result is a verdict that goes up on appeal and is reversed and must be retried. And the failure to settle can create risks that a judgment may not be collectable because of bankruptcy or other insolvency issues, as well as the problems associated with going through the collec-

tion procedure and dealing with the potential of hidden assets.

Make sure the client understands what has gone on prior to the mediation in terms of negotiations and that you both understand where the settlement discussions will start. It is very useful to have a game plan for the negotiations as you proceed through what some mediators have called the "dance of symmetry."

Finally, make sure your client understands that once the opportunity for settlement has passed, the opportunity to be able to decide how the matter will resolve will pass from the client's control into the hands of strangers—a judge and / or jury—to make the decision.

What the Client Should Do to Prepare

The first thing the client should do to prepare is to **insist that at least one pre-mediation meeting with her attorney be set.** The mediation is just as important as the trial and should be treated with the kind of respect that pretrial meetings would command. It is not sufficient to simply meet the attorney at the mediation and "wing it."

The client should **make arrangements for child custody or time off work** so they are not distracted. The client's workplace or child care provider should understand that the mediation will take the entire day, sometimes well into the evening. Being distracted by a pick-up time for children or something looming at work will be detrimental to the process.

The client should **be prepared for often extended periods of inactivity during the mediation.** This time should not be spent wandering around in any public areas of the mediation site and discussing the case where it might be overheard. When the mediator is with the client, cell phones, pagers and other distractions of this sort should be turned off. This is also important to preserve the confidential aspects of the mediation.

The client should **discuss the case with others who are affected by the outcome** of the dispute, whether that be family or business associates. The client doesn't want to be in a position of refusing to resolve the matter because the client is not sure how others might react to a proposed resolution. Typically, the litigation process is as much a burden as the consequences of the claim.

It is important to **know whom to bring to the mediation.** Certainly the parties need to be there, but it is important to bring somebody who is a decision maker and who is dispassionate about the case. A good example is an employment case in which the person who is accused of the sexual harassment is present and is invested in not settling the case. It is good to have somebody there who can make the decisions who is not invested in a particular outcome.

The client should prepare herself as if the mediation or settlement conference is **their "day in court."** This may be the time for the client to participate and tell her story to the mediator. Catharsis is as important an element to resolution as money, if not more so. This means that the client must prepare herself in all ways. Dress as if this is trial. Know the facts of the case as if it were the trial. Prepare mentally for the case to be completed at the end of the mediation.

Although the mediator is not a judge in the sense that she will make decisions about the case, the mediator is still a neutral who will present the other side's arguments to the client—sometimes forcibly. The client must prepare herself by remembering that the mediator is doing her job and is not attacking the client or impugning the client's integrity. The client needs to **depersonalize the comments and observations of the mediator** and remind herself before, and during, the mediation to maintain a positive frame of mind.

The client should prepare by coming to the mediation with **a positive outlook and a commitment to remain as long as**

it takes. There is always a time in every mediation when things don't look like a resolution can ever happen. Don't just "throw up your hands" and quit too soon. It is often just after this point in the mediation when things move toward settlement. Come to the mediation with an optimistic attitude, and often that will be rewarded.

David J. Damron is a certified mediator and a judge pro tem *for the Maricopa County Superior Court. He is also the managing director of Sanders & Parks, P.C.*