

The Expert Witness May Improve Your Mediation Success

BY MARK ZUKOWSKI



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In my experience, it is the rare mediation where a party invites its expert witness to participate in mediation. Is it something I would recommend in every case? Clearly, no. Can it be a game changer in the right case? From this mediator's perspective, definitely yes. This article addresses the important considerations in determining whether to involve your expert witness in mediation.

Before Bringing an Expert Witness to Your Mediation

Even before deciding whether to bring your expert witness to mediation, it is always a good idea to involve him or her in the pre-mediation process. To effectively advocate your position in mediation, you need to have an excellent grasp of all the technical and scientific issues that will be discussed during the process. Involving your expert witness in your pre-mediation preparation ensures you will be fully prepared.

An experienced expert witness also can bring value by helping you select the right mediator for your case. To assure the best possible mediation outcome, selecting the right mediator with appropriate knowledge and experience of the technical or scientific issues that will be discussed is critical. Often, your expert witness will have had prior experience with potential mediators and can provide you with valuable insight in selecting the right one for your case.

Another very important consideration before bringing your expert witness to mediation is the potential for waiver of confidentiality or work product by prematurely disclosing the expert witness's or your work product to the opposition if the case does not settle at mediation. You need to be mindful of this potential pitfall. Make certain you evaluate what information to provide your expert witness to review if you

intend to bring him or her to mediation. It is strongly recommended that you label all information provided to your expert witness prior to mediation "for settlement purposes only" or similar limiting language. An expert witness who has been provided access to the parties' mediation statements

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also should understand that information contained in these memoranda may not later be used by the expert witness in future reports or testimony.

While most states have statutes protecting communications occurring during mediation, it is still a good idea to discuss these issues with opposing counsel and the mediator prior to mediation. This ensures there is clear understanding and agreement on how communications will be protected going forward. This is particularly important when involving third parties, such as expert witnesses, in mediation.

Apprehension about bringing your ex-

pert witness to mediation usually centers around the concern that if the case does not settle, you will have prematurely disclosed your case to the opposition. However, with today's mandatory disclosure rules, this concern is largely a non-factor. Also, consider this: If you brought your expert witness to mediation and the case did not settle, it may be because your expert witness was not as effective as you thought he or she might be. Better to learn this in mediation than in trial.

Apprehension about exposing your expert witness to the opposition in mediation also ignores the reality that the vast majority of your cases will settle before ever getting to trial. Furthermore, if you have confidence in your expert witness, you should not fear exposing him or her in mediation; rather, you should relish the opportunity to demonstrate the strength of your case—not only

to the opposition but also to the mediator. Having your expert witness participate in mediation can enhance your credibility and send a strong message to the opposition and mediator that you have confidence in



your case. It also demonstrates that you are clearly invested and prepared for the mediation.

So, when should you consider bringing your expert witness to mediation? There is no hard and fast rule for making this decision. Rather, each case should be evaluated on its individual facts. Certainly, if your case involves technical or scientific issues, there can be substantial benefit to bringing your expert witness to mediation. While you may feel you have a good understanding of those issues that will be discussed, the same may not be true of your opposition or your mediator. Bringing your expert witness to mediation can ensure both parties and the mediator have a better understanding of your case. This is also likely to lead to a better resolution.

Involving your expert witness in mediation is particularly beneficial when cases are mediated pre-suit, or very early in the litigation process. A well-prepared expert witness can save you time and expense by clearly identifying the key facts and issues in dispute. They may separate advocacy and emotion that lawyers and clients typically focus on in mediation, and provide a more objective analysis of the case. A well-prepared expert witness also can provide valuable assistance in educating the opposition of the weaknesses in their case or by providing damage models, repair protocols, or other recommendations to facilitate case resolution. Finally, your expert witness can assist counsel and the mediator in diffusing unreasonable client or opposition expectations, and focus the parties on a realistic resolution of the case.

Still on the fence about involving your expert witness in mediation? Consider this: How many times have you had a mediation break down because a technical or scientific issue was raised that you could not adequately explain, did not anticipate, or did not have an answer to? How many times

have you felt frustration that your mediator, or the opposition, did not fully understand the strength of your case or the weakness in the opposition's case? Having your expert witness participate in mediation can eliminate these pitfalls from derailing the mediation or maximizing your settlement.

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So how do you know when to consider bringing your expert witness to mediation? There are a number of practical considerations to evaluate before answering this question. Will it be cost-effective? Are the issues your expert witness has opined on so technical or scientific that your mediator and the opposition would benefit from further explanation and analysis? Are you completely confident in how your expert witness will present and in his or her opinions to expose your expert witness to the opposition's scrutiny during mediation?

You're Bringing an Expert Witness—Now What?

It is recommended that you broach the subject of bringing an expert witness in advance of the mediation, first with opposing counsel, then with the mediator. It is important that both parties and the mediator agree on whether expert witness-

es will participate in mediation and, if so, what role they will play. This allows the mediator to better control the mediation by limiting the expert witness and counsel to the expert witness's intended role. It also may prevent your mediation from ending prematurely, because the other side did not know or anticipate that you would bring your expert witness to mediation, resulting in the opposition feeling unprepared, blind-sided, or unfairly attacked.

Assuming you cross the hurdle about bringing your expert witness to mediation and the mediator and opposing counsel agree to allow your expert witness to participate, the question then becomes how to effectively use your expert witness in mediation. The most common way is to have your expert witness make a presentation in an opening joint session with the mediator and the opposition. If done right, this can have a powerful impact. It allows you to set the tone for the mediation and it demonstrates your preparation and your belief in the strength of your case. In cases involving highly technical or scientific issues, it can ensure the mediator and opposition have a clearer understanding of your case from the outset, saving valuable time to focus on resolution of the case.

It is also important to prepare your expert for mediation just as you would your client. Never assume your expert witness will be familiar with the mediation process. Your expert witness can sabotage your best intentions if he or she does not understand the role you want him or her to play during mediation.

It is critical that you educate your expert witness on your expectations for their participation in mediation. Will they simply observe and listen, and be available to educate you and answer your questions during private caucus sessions? Is it your intention to have your expert witness make

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a presentation in a joint session? If so, have you carefully prepared your expert witness for the presentation? Are you confident enough in your expert witness to allow him or her to engage in face-to-face discussion with opposing counsel, any opposing expert, if one is present, or with the mediator?

You also should educate your expert witness about your mediator's experience, mediation style and subject matter knowledge. Similarly, it is important to educate your expert witness about opposing counsel and client. Preparation is the key to success.

What if the Case Does Not Settle?

Was the decision to involve your expert witness at mediation a poor one? Not necessarily. There are still benefits to be derived

from bringing your expert witness to mediation. In all likelihood, with the assistance of a well-prepared expert witness, the issues that remain in dispute after mediation will likely be substantially narrowed, resulting in more focused discovery and considerable savings in time and expense before the case is finally resolved.

Another benefit to having your expert witness participate in mediation is that you have the opportunity to test your expert witness's opinions before they are finalized for trial. Particularly if the technical or scientific issues are novel or unsettled, bringing your expert witness to mediation can provide you with valuable feedback on the merits of your case. It also can be an ef-

fective strategy for learning the strengths and weaknesses of your opponent's case and allow you time to modify your case strategy for trial.

Final Thoughts

In the proper case and with the appropriate preparation, bringing your expert witness to mediation can be a powerful weapon in your mediation arsenal. The next time you sit down to prepare for mediation, consider inviting your expert witness to the party. It may just make the difference in whether your mediation is a success. 