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Hays/Raman: Do not treat mediation as routine and ordinary

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Hays

By Thomas C. Hays and **Barath Raman**

Preparation is the key to success. As lawyers and advocates for our clients, this is not a foreign concept to any of us. However, when it comes to mediation, I (Tom) have found that attorneys sometimes forget this key advice.

When I first started practicing law, it was typical to try a case; we had less volume, worked without email and our clients had higher risk tolerances. However, I recently read that 95 percent of civil cases resolve prior to trial, and in my experience, most of those cases are resolved at mediation. Because mediation has become the most effective way to resolve a pending case in today's practice of law, it has become imperative that we prepare for mediation just as we would have many years ago when we prepared for trial. Mediation has quickly become our one time as litigators to properly advocate our client's position. It has allowed us to show our litigating skills in opening statements and our counseling skills in caucuses. Our clients get their "day in court" and feel zealously represented, while our opponents assess our performance and evaluate, if this case were tried, how we would present in front of a jury.


Raman

As a 40-year litigator and a 30-year mediator, I understand the stress of juggling multiple cases, managing numerous deadlines and attempting to satisfy clients' expectations and financial needs. As a result, it is not uncommon to find attorneys prematurely scheduling mediation in the hope that a lawsuit will settle. I continue to tell young attorneys, however, that while mediation is effective, it is a mistake for them to treat mediation as routine and ordinary. Just like trial, attorneys should master the facts and the law pertaining to the dispute. I have found that an attorney who is better prepared with the facts and the law can better articulate his/her views and is undoubtedly likelier to achieve a result favorable to his/her client. Accordingly, parties that have completed discovery and provided expert or IME reports to opposing counsel prior to mediation have a better opportunity to settle. This additional information allows both parties to assess the strengths and weaknesses of their case, and their opponent's as well.

Today, our clients are focused on metrics and trying to make the best business decision. It is one reason they have decided to limit their risks and settle these cases rather than trying them. If we do not properly prepare, we could spend additional money and time re-mediating a case. Prior to mediation, I suggest that litigators appropriately address the following: (1) assess the risk of exposure to your client if mediation fails; (2) strategize on potential settlement resolutions; (3) resolve outstanding indemnification and insurance coverage issues; (3) address lien holders and related reimbursement obligations; (4) explore and identify any independent witnesses who may provide support for your client's position; and (5) assess whether an expert report is needed to help dismantle the opposing party's theories. Then meet with your client and prepare him/her for mediation by reviewing the facts and law, and explaining what you believe

to be the appropriate settlement value. Spell out everything. At the end of the day, you do not want your client, or even you, to be surprised at mediation.

Before you step into mediation, do not forget to provide a timely confidential submission to your mediator, even if he/she does not require one. This informal letter should summarize your client's various litigation positions, including any rebuttal positions. The confidential submission provides us with an opportunity to address issues, concerns and questions to the mediator and pin-point where exactly the parties expect hiccups during this mediation. I have found as a mediator that a well-written submission will enable me to get a grasp of the type of case, the facts and the liability and damage issues. This preparation gets everyone off on the right foot and focuses the parties on the true dispute.

If you do not believe me, here is what other Indiana mediators have to say on the topic:

"Don't fall into the trap of, 'Let's just see what happens at mediation.' Treat mediation as you would any hearing where you have the burden of proving your case. Provide the other side with all materials and documentation they need to consider prior to the mediation, and at the mediation, demonstrate the proof that convinces the other side of your position."

—Lee Christie, Cline Farrell Christie & Lee P.C., Indianapolis

"If the case is worth it, plaintiff's counsel should have a doctor's opinion on causation (written report or deposition) prior to mediation. On the other side, I feel bad for defense counsel when the insurance person who's evaluating their case is located four states away from the mediation arena. I'm reminded of the adage, 'Idealism increases in direct proportion to one's distance from the problem.'… At mediation, and in your practice, resolve not to be someone's bad example."

— Judge Richard McDevitt, McDevitt Mediation Center, Merrillville

"A more useful and successful mediation can be achieved if the parties have a realistic understanding of the potential strengths and weaknesses of their case should it be resolved in court, along with a realistic appreciation of the benefits offered in mediation — particularly control, risk avoidance and litigation cost savings. A mindset to consider a compromise also helps."

— Erik Chickedantz, Burt Blee Dixon Sutton & Bloom LLP, Fort Wayne

"I am repeatedly seeing lawyers waive opening statement. In my view, that is a mistake. There is much to be learned in an opening statement, and the reactions of the parties and their counsel give the mediator a great starting point for discussing the case."

— John C. Trimble, Lewis Wagner LLP, Indianapolis

"Prepare in a way that you make it as easy as possible for the other side to do what you want — no surprises."

— Sam Ardery, Bunger & Robertson, Bloomington

"You really cannot overstate the importance of upstream work and preparation for mediation. It involves making sure the right people are involved and available (i.e. decision-makers and persons of highest or, at least, adequate authority). It means assuring that clients have been properly prepped and that demands and supporting documentation have been provided well in advance of the mediation such that they may be meaningfully considered at the mediation. New information and surprises can sink a mediation. Adequate preparation and prior communication and documentation floats the mediation boat."

— Neil Bemenderfer, The Mediation Group, Indianapolis•

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