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## Mediation: Early and Often for Cost-Effective Litigation

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June 10, 2011
*The Legal Intelligencer Blog*

Litigators always are on the lookout for strategies to help reduce litigation costs. After all, we are service providers – and typically that service boils down to dollars and cents – achieving the best result at the lowest cost. In seeking out cost-effective strategies, one universal rule holds true: the sooner the lawsuit concludes, the more likely it is to be cost-effective.

I recently mediated a case in another jurisdiction that resulted in settlement. Some jurisdictions have a long tradition of court-ordered mediation, with the process and results more structured than here. This is not to suggest that the mediation was an easy go. The case was difficult and expensive with capable opposing counsel. Nevertheless, the case was resolved before expenditures for depositions, expert discovery, motion practice or intensive trial preparation.

Much can be learned from the way others mediate disputes. Here are some pointers from my recent jaunt in mediation.

### Timing: It's Not Too Early.

From my earliest days in practice, lawyers complained that settlement conferences were held too early, before all the facts had been aired in discovery. Lawyers tend to obsess about fact development. By contrast, business people are able to make decisions – often involving far greater sums than at stake in litigation – without taking 20 depositions.

Due diligence is important. Knowing all facts on sworn knowledge may not be, particularly when the cost of nailing down those facts fails to increase or decrease settlement value. In some cases, the ideal time for mediation follows an initial document production but precedes depositions and motion practice. Besides, factual unknowns can be explored in the mediation itself.

### Learn About Your Case Through the Mediation.

Mediation briefs directed to the mediator are confidential, but they should be shared among the parties. The brief will provide a blueprint to your opponent’s legal and factual arguments. For greatest effect, the mediation brief should be shared two to

three weeks in advance of the mediation. Take the time to explore the arguments; some will hold water and some will not. Challenge the weaker arguments at the mediation. Learn from the rebuttal – or lack thereof – at mediation.

More can be learned when principals attend a mediation. A knowledgeable party in attendance can provide substantive information about the merits or available assets to satisfy a judgment, or they can instruct that the source of information lies elsewhere. The litigator can learn how anxious a party is to settle, observe the relationship between the party and her lawyer, and hear the party's responses to "soft-spots" of the litigation. Even if unsuccessful, the mediation provides a preview of the party's potential performance as a witness in advance of the deposition or trial.

### Be Creative.

Remember, this is your mediation. Litigators who live and die by court rules may be less adept at using mediation's flexibility. Mediation allows the parties to "control their own destinies" through crafted solutions that could never be obtained through a complete victory at trial. For example, I was involved in one unfair competition lawsuit that settled with the acquisition of one business by the other.

### The Mediator as "Birdie on Your Shoulder."

Good mediators are the key to a successful mediation, and sometimes it pays to pay the mediator for his work. Good mediators are quick to grasp the essence of the dispute, garner trust from all sides, and are keen amateur psychologists and observers of body language. Once the trust is established, the mediator is privy to a wealth of information, such as sensing a party’s breaking point and assessing the weakness of a party's response to a legal argument.

Let the mediator be the "birdie on your shoulder." Use him or her as a sounding board and to convey counter arguments to the other side. Most importantly, take advantage of the mediator’s inside knowledge of the other side's "bottom line." Obviously, the mediator cannot favor one side over the other with information, but he or she may have valuable suggestions or insight that if shared can move the matter toward resolution.

### Don't Give Up.

Mediation takes time, but it takes much less time than to go to trial. However, an artificial limit to the mediation – say, 3 hours – is not a recipe for success. Often, arguments need time to "set in." Or, a party may need the psychological space to adjust to paying more or receiving less than planned. In fact, a second mediation session often is more effective than the first.

Just when it seems like further progress is impossible, give it a rest for two weeks and then revisit your mediator. Someone could have received a bill for legal services in the interim, or fears an upcoming deposition, resulting in a change in the settlement dynamics.

### Don't Release Your Mediator After You Agree on a Number.

Once the parties agree on a number, the rest should be downhill. But sometimes the non-monetary terms of a settlement are more difficult to craft than reaching monetary agreement. Again, use the mediator as the "birdie on your shoulder." He or

she can suggest alternative language or terms. They may have a more trusting relationship with the other side and can advocate challenging settlement terms.

Mediation is not a panacea. But it does provide the opportunity for parties to control their respective destinies in litigation. Litigators should embrace its benefits early and often for greatest effect.

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