Representing Your Client in Mediation

Mediation Advocacy: An Emerging Field of Study and Practice

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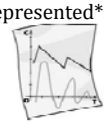
Sources of Information

- ABA Guidelines for Representation in Mediation Competition
- Empirical research
- Experience

- This presentation is designed for anyone representing clients at mediation

Empirical Data

Settlements in EEO mediation involved smaller dollar amounts when charging parties were unrepresented than when they were represented by a lawyer or other person, but found no differences in settlement amounts depending on whether responding parties were represented or unrepresented*



* E. Patrick McDermott & Ruth Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of of Mediator's Style on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75, 102-05 (2004).

Satisfaction

A study of EEO mediation also found no relationship between representation and parties' satisfaction with the mediated outcome.*

*Varma & Stallworth, supra note 84, at 402-03. The mean ratings were 3.27 and 3.24 for unrepresented and represented parties, respectively. The authors did not report statistical significance tests, but this is unlikely to be a true difference

Expectations

Parties often had inaccurate and unrealistic expectations about mediation. Although unrepresented parties sometimes sought out information about mediation, this was not necessarily helpful. **Represented parties were not always better informed about mediation** (emphasis added)

Perception of Fairness

Charging parties were less likely to be "very satisfied" with mediation's fairness when they were represented by a lawyer than by other types of representatives, but the reverse was true for represented responding parties *

* Lisa B. Bingham et al., Exploring the Role of Representation in Employment Mediation at the USPS, 17 OHIO ST. J. ON DISP. RESOL. 341, 356, 364 (2002); Tina Nabatchi & Lisa B. Bingham, Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists, 18 HOFSTRA LAB. & EMP. L.J. 399, 401-03 (2001).

Prepare, Prepare, Prepare

The more preparation lawyers gave their clients, however, the more favorable the parties' assessments of mediation and the more likely the case was to settle*

*Numerous studies

Preparing Your Client for Mediation

- Goal is to overcome impediments to settlement
  - Explain in detail *realistic* process and procedure
  - Develop a representation plan based upon the parties respective interests'
  - Execute the representation plan at mediation, adjusting to new information

Developing Your Representation Plan

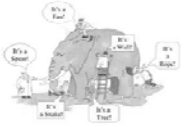
- Jointly develop a representation plan with the client
- The plan is generally 1 to 2 pages long
- Decide how active the client/rep's role will be mediation
- Discuss the negotiation tone
- Adjust the client's expectations

Responsibility Sharing and Allocation Strategy

- How will you divide the responsibilities
  - Who opens, why
  - How will the law, facts, emotions be introduced
  - Who will address the law, facts, emotions in mediation
  - Will settlement proposals be discussed in caucus only
  - Account for clients knowledge, strengths and vulnerabilities
  - Representative must ensure client can make an informed decision regarding settlement possibilities

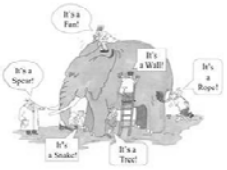
Your Sides Interests

- Describe the interests that your side plans to advance in mediation session.
  - What does your client need, want expect from this mediation
  - Respond to developments occurring during mediation, especially new information and unforeseen moves
  - Has your BATNA been fully developed
    - Jointly evaluate potential options, before deciding BATNA



Other Sides Interests

- Describe the interests that you expect their side to advance in the mediation session.
  - What do they need, want expect from this mediation
  - Has their BATNA been fully developed
- Same elephant



Negotiation Strategy

- Strengthening your BATNA while weakening their BATNA
- Address legal and non-legal interests
- When do we request a caucus
- Do we make the first offer or demand
- How will you use the mediator
  - What information will you share
  - Send signals of flexibility
  - How forthcoming with your reservation price

Advocate Client's Interests

- Do not sacrifice client's interests in order to be collaborative
- Do not sacrifice client's interests in order seek competitive advantage

Focus on: Cooperation **and Collaboration**

Case Study

Develop a balanced negotiation plan

- Responsibility sharing
- Allocation strategy
- Your side's interests
- Other side's interest
- Negotiation strategy