

# Effective Use Of Mediation To Avoid Settlements On The Courthouse Steps

PATRICK J. LAMB  
JAMES A. MORSCH

With weeks of intensive trial preparation behind her, lead counsel strides towards the courtroom ready to deliver her carefully rehearsed opening. As she enters the courtroom, the judge's clerk says that the judge would like to see both counsel in his chambers. As the parties enter, the judge looks at the defense lawyer and says "Counsel, I understand your client has done some further thinking on the subject of settlement." "Yes, your Honor," the defense lawyer replies, "Having reflected on the matter further, my client is now prepared to offer \$850,000 to resolve this matter." The judge smiles. The parties are only \$250,000 apart and he knows he will be able to fit in nine holes later that afternoon.

Inside counsel cringe every time such stories are told. Settling on the proverbial courthouse steps, after investing in the full cost of defense and trial preparation, represents a failure of the litigation process. Whether it is a defendant getting cold feet or a plaintiff suddenly realizing that the perfect case is not all it was promised to be, courthouse settlements are far too common. The reasons are many—

lawyers wanting to get their fee before a case goes away, lawyers' lack of skill in negotiating or communicating with the other side, clients fearing that starting the process makes them look weak, or a simple failure to focus on a case's weaknesses until the eve of trial.

Mediation may not be a magic elixir for all ailments, but done right, it overcomes a lot of the hurdles that lead to courthouse settlements. An effective mediator can bring even the most hostile partners together to a compromise early in the case, saving the substantial costs of trial preparation.

There are a number of factors that influence the success of a mediation. Care and consideration must be given to each.

## 1. You must have a mediation strategy.

Depending on the type of case, you need to focus on what it will take to get the other side to move from where they are to where you are. Do you need an "independent" evaluator of the merits of the other party's claim, that is, someone who can overcome whatever preselling has been done by the party's lawyer? Do you need someone with experience in the boardroom who can help your own or the opposing side's executives deal with internal corporate issues raised by the dispute? Your

strategy will play a critical role in every other stage of the mediation process. Make sure your strategy is sound going into the mediation process.

## 2. Identifying the right mediator.

Mediators come in all shapes and sizes. Some are "head-bangers" who are prepared to argue the merits in order to convince the parties of the need to move off their pre-ordained positions. Some are empathetic, using empathy as a tool to get in the head of the parties. Some are active, others are passive. The right mediator for a business dispute may well not be the right one for a personal injury claim. Some have experience dealing with insurance representatives, some don't. Some have boardroom or General Counsel experience. Give a lot of thought to what kind of expertise, background and style you want in your mediator to maximize your mediation strategy.

## 3. The selection of the mediator.

Sometimes it is critical that the other side select the mediator, particularly if you are expecting the other side to make dramatic movement while your side does not. This can be accomplished by planting a bug in someone's ear—"have you ever heard how so and so han-

dles mediations?” or giving a short list of potential mediators to the other side and letting them pick from the list. This is a “show not substance” factor, but frequently a critical one, and always one that is a challenge to a lawyer’s people skills.

#### 4. The mediation process.

The structure of a mediation is very important. If you think you can do a better job presenting your client’s position to the other side than their lawyer can, the ability to “make a closing” at the beginning of the process is important. Likewise, if you have some new blockbuster evidence, that may be the time to unveil it. If you are concerned about seeing something new, you might seek a structure where the other side makes a presentation and then the mediator conducts one-on-one meetings before you make your presentation to the other side.

#### 5. Who attends for your party.

If there is substantial animus against an individual or between two individuals, it may be wise not to have them there but instead have someone speak on their behalf. Years ago, there were a series of mediations where the parties opposing our client just hated the CEO. His name was poisonous. In both cases, that venom had to be neutralized to achieve a settlement. The CEO’s presence was discouraged and through the course of several long days, the venom dissipated until the aggrieved party could focus on the business at hand.

#### 6. Humanize the event.

Being nice does not mean giving up your position; in fact, it may enhance your chances of a successful outcome. After all, it’s harder for an adversary to maintain the passion that frequently prevents a settlement if you’ve spent time talking about his sick mother. At the same time, you must remember to immunize yourself from the many tools effective communicators have to get inside your or your client’s head. In one of our mediations involving an accident where a waste truck rammed a bus from a nursing home, some of the plaintiffs were people who had been hurt badly, others were representatives of their deceased parents. The mediation was successful when the mediator realized that each family simply wanted to tell our client representative, a high ranking officer, about what they had lost. There were tears, prayers and apologies for the tragic event. And when settlements were reached, there were hugs. The defendant achieved a favorable settlement because the representative helped the plaintiffs secure the emotional relief they needed.

#### 7. Properly prepare your case.

This includes an evaluation of prospects of losing, potential verdict ranges, punitive damage or publicity risks. Develop your negotiating strategy. How much will put on the table and how much will you hold back to reward the mediator’s efforts. War game the mediation—what will you do if the mediator starts to beat up on your client. Do you have “walk out” points? Do you have non-financial concessions to make? In other words,

you need to be as prepared for a mediation as you do for a trial.

When mediations fail, the reason is frequently because parties did not prepare adequately or because due consideration was not given to these seven factors. But if you follow these rules and push for a mediation early in a case, your client may well be thrilled with the result and the fees saved and spared the prospect of a last-minute settlement on the courthouse steps.

*Patrick J. Lamb and James A. Morsch are partners in Butler Rubin Saltarelli & Boyd, a Chicago litigation boutique. Both have mediated a number of cases. The views expressed are personal to the authors.*