

Six Things You Need to Tell Your Client About Mediation

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by Jonathan B. Frank

The use of mediation has risen dramatically, as judges and lawyers recognize the value of maintaining control over the resolution of cases. Still, your client probably has no idea how the process works or what will be expected of him or her. Here are six things you need to say.

Mediation Works. Your client needs to understand that mediation has become an essential and successful part of the litigation process, so have this discussion right away. Indeed, most judges will order/strongly recommend mediation at some point in the case. But you don't need to be in litigation to mediate – in fact, sometimes, the absence of litigation helps promote successful mediation.

Talk to your client in basic terms. Explain that the mediator is a neutral third party with experience helping to settle cases; that the mediator, unlike an arbitrator, does not make decisions (don't gloss over this, since most clients won't initially be able to distinguish mediation from arbitration); and that the client will retain ultimate control over the process. Emphasize the value of control – this is mediation's strongest selling point. Don't be afraid to discuss the cost. Keep in mind that although the additional cost may be unexpected, mediation creates efficiencies in the process (streamlining discovery, for example) that far outweigh the cost.

Be ready to answer the question: Isn't it a sign of weakness to propose mediation? I've tried different answers, all based on the theory that all cases come to an end eventually and that it's not a sign of weakness to engage in a process to bring resolution sooner rather than later. I usually add that since the settlement itself depends on the client's consent, the client can avoid a "sign of weakness" by not agreeing to unsatisfactory terms.

The Mediator Matters. Explain how you will select a mediator. If the other side proposes a mediator, and you are

happy with the choice, make sure your client understands that the mediator can't "do any favors" for the other side, and that it is often an advantage for all sides if opposing



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(248) 921-3456

P.O. Box 7501, Bloomfield Hills, MI 48302
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jdgfxed@yahoo.com
jdgfxed@gmail.com

counsel chooses a mediator he/she respects. Once the mediator is selected, send your client a biography and/or a link to the mediator's website.

Different mediators have different styles. Find out as much as you can about your mediator and share that information with your client.

Set Realistic Goals. Unrealistic expectations can make mediation difficult – even impossible. Since the evolution of expectations is a long process, start this conversation as early as possible. As mediation approaches, this conversation becomes more concrete – your summary might be the first time your client sees their complete “story” in writing. This is also a good time to focus the discussion on what your client really wants from the case, since you'd like to be able to signal that in the summary. Equally important, this is an excellent time to elicit your client's sense of what the other side wants, and what's preventing the other side from settling. You may be surprised at your client's insights, especially if the legal dispute is but a part of the tension between the parties.

A quick note about the summaries: Sometimes the summaries are exchanged with opposing counsel, sometimes not. Make sure your client understands which option

you've chosen. If the summaries are exchanged, prepare your client for the tone of the opposing side's summary – you don't want the process derailed before it's even begun because your client is offended by the aggressive positions advanced by the opposition.

Prepare for the Day. As the day of mediation approaches, you'll need to spend a lot of time explaining what will happen. Start with the mechanics of the process: the mediator may place the parties in separate conference rooms (find out about this by asking the mediator ahead of time); the mediator will explain the process, including confidentiality restrictions; the mediator will ask for a settlement position; the mediator will shuttle back and forth proposing options; the mediator may spend a lot of time with the other side (encourage your client to bring something to do to pass the time); the mediator may highlight the strengths of the other side's case; the mediator will focus on likely areas of settlement; and, if the case settles, the mediator will ask that the parties document the settlement before leaving. Finally, make sure your client understands that a mediator may ask the clients to make payment before the mediation, or bring a check to the mediation. You don't want this to be a surprise.

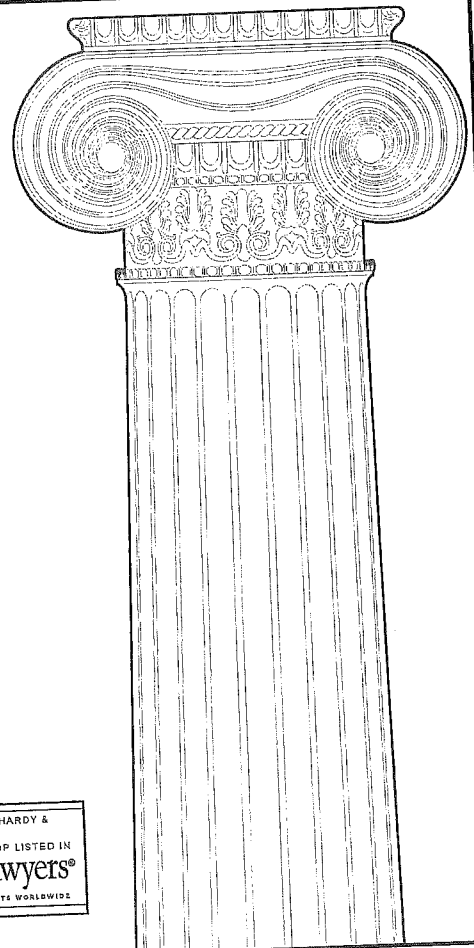
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One aspect of mediation deserves special attention: your client's desire and ability to communicate with the mediator. To your client, there may not be much difference between mediation and trial. Both allow your client to "tell the story" to someone in a position of authority. This process alone often creates a cathartic environment for settlement that didn't exist before. Therefore, it's important for you to discuss with your client how much he or she is comfortable saying, keeping in mind that although clients may suggest at first that "you do the talking," once the mediation starts your client will feel more at ease and is thus more likely to participate.

As you discuss the benefits of mediation, appreciate that the speed of mediation can be overwhelming. The dispute has simmered for months – maybe years – and now, in a day or less, the parties might move from "no chance" of settlement to a documented agreement. Your client will not believe that this can happen, and with good reason. By definition, no other day has produced a settlement. To borrow from the central theme of the Jewish holiday of Passover, why should this day be different from all other days? Well it is, so make sure your client is ready.

Keep an Open Mind. This brings me to the most critical piece of advice you need to give your client: keep an open mind. Think of how often and quickly positions get modified during mediation. Whether it's dollars or non-monetary options, a lot changes in a short time. Prepare your client for this. Have your client articulate his or her goals. Role play. Suggest various alternatives. Cross-examine your client about why your client feels certain things are important. If your client says, "I need \$100,000 to settle," make sure there's a principled reason for that figure, because there will certainly come a time during the mediation when you'll have a discussion about the virtues of settling for \$90,000. A client who hasn't reflected on this possibility will feel rushed to make a decision. And you don't want that. You want the opposite: a client who feels that mediation is the natural resolution to a longstanding problem, even if four hours seems like an awfully short amount of time to have moved so far.

Get Good Advice. Finally, identify people your client might want to rely on for advice, such as a spouse, good friend or a business associate. Get those people involved before the mediation. Your client obviously values their input, and this is a big decision. Bring them to the mediation if your client wants (make sure you let the other side and the mediator know). Remember, you want your client to feel comfortable with the process and the result, success or not. You can certainly provide some guidance, but perhaps not all. Another important factor is your client's natural fear of being second-guessed. The last thing you or your client wants is to believe, days or weeks after the mediation, that he or she made the wrong choice because he or she has heard negative comments from someone who could have been involved at the mediation. Friends and family of litigants are some of the most vocal "Monday morning quarterbacks."

Fully preparing your client for mediation accomplishes three important goals: your client will understand why you recommended the process, your client will participate knowledgeably, and your client will be able to live with the outcome. This last goal can't be overstated – if the case doesn't settle and moves toward trial, your client will at least find some comfort in the fact that he or she tried everything possible to avoid having a third party make the final decision. Remember, although you may refer to yourself as a "litigator," your client has really come to you for help resolving a dispute. The more tools you have available the more likely it is that your client will be happy with the result.

Jonathan B. Frank is a graduate of Stanford University, with distinction, and the University of Michigan Law School, cum laude. He is Of Counsel to Jackier Gould, P.C. in Bloomfield Hills, focusing his practice on resolution of business and real estate disputes. He is chair of the OCBA's Circuit Court Committee, and is also a SCAO-trained mediator and a neutral arbitrator for the AAA. He is on the board of several Detroit-area nonprofits, including the Detroit Urban Debate League and the Detroit Police Athletic League. Please direct feedback to frank@jackiergould.com.



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