Ten Practical Tips for Representing Clients in Mediations

43 La. B.J. 142

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Louisiana Bar Journal
August, 1995

Feature Article

Thorough preparation is the key to effective representation of a client in a mediation. Here are 10 practical tips for representing clients who are mediating disputes.

1

Educate Yourself About the Process

Before going to a mediation, the lawyer should know what mediation is and how the process is conducted. Mediation is a dispute resolution process that uses a trained neutral third party - a mediator - to assist the parties in resolving their dispute. Unlike an arbitrator, who has the authority to render a binding decision, the mediator has no power to bind the parties. The function of the mediator is to assist the parties in reaching a settlement.

Most mediations can be completed within one day. During the opening phase of the mediation, known as the joint session, the parties are allowed to make presentations directly to the mediator and to each other. During the joint session, the mediator and the parties learn more ***143** about the case, and the mediator initiates discussion on the critical issues that are identified. Many mediators then meet separately with each party in a private confidential session known as a caucus. During the caucus, the mediator works with each party individually to ascertain the real needs and interests of the parties. The mediator may hold as many caucuses as are necessary to resolve the dispute. Nothing disclosed to the mediator during the caucuses is disclosed to the other party without the consent of the party making the disclosure. The caucuses allow each party to reveal relevant information to the mediator that the party does not want communicated to the other party.

During the caucuses and joint sessions, the mediator uses mediation skills and expertise to assist the parties in exploring the strengths and weaknesses of their cases, to communicate possibilities of movement, to explore alternatives and to narrow the differences between the parties. This process usually results in settlement.

2

Prepare the Client for the Mediation

Clients familiar with the trial process may be aware that, in a trial, lawyers play a primary role in the examination of witnesses. During the mediation, however, the clients are present and play a major role in the process. Clients need to be educated about their role, the role of the lawyers and the role of the mediator in each stage of the mediation.

To prepare for mediation, the lawyer should meet with the client to discuss in detail the manner, length and substance of the opening presentations, the joint session, the caucus and the closure of the mediation. The lawyer also should explain the negotiation process to the client, that mediation is a structured negotiation and that there will be many offers and counter-offers exchanged at the mediation. Mediation is a give-and-take process where neither party should expect to receive

everything that it wants from the other. The objective of the mediation is for the mediator and the parties to find a solution that best serves the interests of all parties to the dispute.

Before the mediation, the lawyer should perform a risk-benefit analysis with the client to evaluate the risks, costs and benefits if the dispute is not resolved at the mediation. Before commencing mediation, the lawyer and client should be familiar with the strengths and weaknesses of the client's case as well as those of the opposing party. The client should be informed that the mediator will explore those strengths and weaknesses during the mediation.

3

Prepare a Position Paper

Before the mediation, the lawyer should prepare a position paper, generally two to five pages long, and send it to the mediator and, if it is desirable, to the opposing parties. The preparation of the position paper serves several goals. First, this preparation makes the lawyer focus on the case. During the preparation of the position paper, the lawyer should outline the important facts and issues in the case. The lawyer also may consider including responses to claims or defenses of the opposing party.

Second, the position paper educates the mediator about the important facts and issues in the case. Some mediators perform preliminary research before the mediation such as perusing relevant cases and statutes. By receiving the position paper before the mediation, the mediator can come to the mediation knowledgeable and informed. If the position paper is sent to the mediator, the party should advise the mediator whether the contents of the position paper should be kept confidential. Some mediators do not require the preparation of position papers. Those mediators believe that prior knowledge of the facts or issues is not necessary and that they can learn this information at the mediation. Even when the mediator does not require a position paper, one should nonetheless be prepared because its preparation can serve both the client and the lawyer in helping them to assess the case.

Third, the position paper serves to educate opposing parties of the client's position. Advance consideration of the client's position by opposing parties causes those parties to take seriously the position espoused in the position paper.

4

Carefully Select the Mediator

All mediators are not created equal. Some mediators give opinions. Other mediators take control of the process and advise the parties as to what they should do. In this mediator's opinion, those mediators are not mediating - they are acting as non-binding arbitrators. Before selecting a mediator, the lawyer should consider several things:

• Does the lawyer want the mediator to give a point of view?

• How will the mediator conduct the session?

• Are both lawyers and clients expected to make presentations?

• Does the mediator require position papers?

• Does the mediator require the parties to a sign a waiver, consent or confidentiality form?

In selecting a mediator, the lawyer should consider the mediator's training, experience and credentials. The experience does not necessarily have to come from conducting mediations. Mediation is a relatively new phenomenon and many mediators have several years of experience as lawyers or other professionals. ***144** These questions should be asked of the mediator directly or of the administrative agency that administers the mediation.

5

Develop a Mediation Strategy

The lawyer should develop a mediation strategy. The lawyer should consider how the opening presentations will be made. Will the lawyer or client go first? Will the lawyer use visual aids or demonstrative evidence? Will an offer be made during the joint session? To develop a meaningful strategy, the lawyer should be cognizant of the client's needs, interests and goals. The lawyer should consider how to respond to the presentations and offers of the other side. The lawyer should discuss with the client possible options, solutions or settlement ranges. This is not to suggest that the lawyer should go into the mediation with a "bottom line," as all parties should remain open-minded and flexible throughout the process.

6

Prepare Opening Statement

Most mediators require both the lawyer and client to make an opening statement. The mediation setting may be the first time that the opposing party has heard a presentation of the client's position. The opening statement is an opportunity for each party to educate the mediator and the other side of the true interests, goals and objectives. Do not underestimate the importance of the opening statement. Generally, at the mediation, the lawyer will make an opening statement followed by the client's opening statement. Some lawyers do not allow their clients to make opening statements in the joint session. Rather, they prefer that the client talk to the mediator during the caucuses. In most cases, it is advisable to allow the client to make an opening statement in the joint session where all parties are present because some cases will not settle until the clients feel they have had their "day in court." The client must be prepared for, and be given an opportunity to participate meaningfully in, the mediation process.

The lawyer should prepare his or her opening statement as well as work with the client in devising the client's opening statement. Both opening statements should cover the goals, interests and objectives of the client. Because the rules of evidence do not apply in a mediation, there is great flexibility in fashioning the opening statement.

7

Listen Carefully

The primary goal of the mediator is to help the parties resolve the dispute through the process of negotiation. The lawyer should listen to the mediator and allow the mediator to perform his or her job. Trust the mediator. A good mediator will be neutral and uninterested in seeing one party obtain a better result than the other. Listen to the presentations of the opposing parties. It is not uncommon for parties at a mediation to learn new information that was not learned during the discovery process. Remain open and flexible to this new information. Do not hesitate to discuss this information with the mediator and the client. Remain open to suggestions of the mediator and opposing parties. Remember that mediation is a creative process.

8

Be Patient During the Mediation

The private caucuses allow the mediator to shuttle back and forth between the parties while exchanging offers and proposals. The lawyer should be patient. It takes time for the mediator and opposing parties to understand suggestions and proposals and to consider offers. Do not rush the process. Do not react too quickly to proposals. While one side to a dispute may have considered his or her own position for months, the mediation may be the first time that the opposing parties have considered that position. Mental impasses are reached during many mediations that nevertheless result in settlement. The lawyer and client should be mindful that most mediations will result in settlement and that sufficient time should be set aside to allow the mediation process to work.

9

Ensure Confidentiality

Most mediators begin the mediation by informing the parties that everything said during the mediation is confidential and that nothing will be disclosed to anyone outside the mediation. However, the mediation process may not be entirely confidential. Some states have mechanisms, such as confidentiality statutes, mediation privileges and local court rules, to ensure the confidentiality of the mediation process. Because the rules of all states are different, the lawyer should ask the mediator what mechanisms will be used to insure the confidentiality of the mediation process. Also, the mediation rules of many private ***145** providers contain statements of confidentiality. To ensure confidentiality, however, the parties should agree in writing that the process is confidential and that neither party will subpoena the mediator's notes or records or call the mediator as a witness at a trial or deposition.

10

Leave the Door Open for Future Negotiations

In the unlikely event that the case does not settle at the mediation, the door should be left open for future discussions. The overwhelming majority of disputes will settle short of trial. Consider scheduling an additional session with the mediator. If the mediation process has been utilized correctly, each side will have a good understanding of the other's needs, interests and objectives. Another suggestion is to keep the mediator involved in the settlement discussions even though another session is not scheduled. The lawyers may feel more comfortable presenting additional offers to the mediator rather than to the other side. Most mediators will be pleased to remain involved in settlement discussions with the parties until the case settles.

Footnotes

Note 1. *Bobby Marzine Harges, a law professor at Loyola University Law School, teaches a course on mediation and arbitration. He is secretary-treasurer of the Louisiana State Bar Association's Alternative Dispute Resolution Section. A trained mediator and arbitrator, Harges received his BS degree in electrical engineering from Mississippi State University, his JD degree from the University of Mississippi and his LL.M. from Harvard Law School. (Loyola University School of Law, 7214 St. Charles Ave., New Orleans, La. 70118)*

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Louisiana Bar Journal
August, 1998

Feature

BLUEPRINT FOR EFFECTIVE ADR
Mediation Advocacy in the Wake of the Louisiana Mediation Act

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During the 1997 Regular Session of the Louisiana Legislature, the Legislature enacted House Bill No. 2347, the Louisiana Mediation Act (La. R.S. 9:4101 through 4112). The purpose of the Louisiana Mediation Act (the Act) is to provide encouragement and support for the use of mediation to promote settlement of legal disputes. The Act promotes the use of mediation:

> by encouraging lawyers to discuss the merits of mediation with their clients;

> by providing that all mediation proceedings conducted in Louisiana are confidential; and

> by stating that a professional code of conduct shall apply to mediators appointed under the Act.

This article discusses how the Act will affect lawyers who represent clients in mediations.

Through a question and answer format, this article will provide an explanation of the Act and provide practical information and advice for those lawyers who will be advocates in the mediation process.

WHAT IS MEDIATION?

Under the Act, mediation is defined as a procedure in which a mediator facilitates communication between the parties concerning the matters in dispute and explores possible solutions to promote reconciliation, understanding and settlement.

WHAT IS THE EFFECTIVE DATE OF THE ACT?

The provisions of the Act apply to all civil cases pending on, and all civil cases filed on or after, Jan. 1, 1998.

IS MEDIATION MANDATORY UNDER THE ACT?

No. Under the Act, the trial judge cannot order the referral of a case to mediation without the motion of both parties. Moreover, the Act is permissive: the trial judge is not required to order the referral of the case to mediation even after both parties have joined in the motion.[1] Because the motion of both parties is required before a case can be referred by a trial judge under the Act, it appears that this provision of the statute ***101** [2] will be seldom utilized because the parties have virtually no incentive to file a joint motion for the referral of a case to mediation. If the parties want to mediate a case, they can voluntarily agree to do so without an order of the court. The parties can simply call on one of the many private mediation services currently operating in Louisiana to arrange for the mediation of the case. The time and expense involved with filing a motion with the court can then be avoided. It is important to note that the Act, as initially introduced, allowed the trial judge to order the referral of a case to mediation after the motion of only one of the parties.[3] However, through the legislative process, that provision was amended and, now under the Act, the motion of both parties is required before the trial judge can order the referral of a case to mediation. While a trial judge arguably has the inherent power to refer a case to mediation, that power is not explicit under the Act.

IF A CASE DOES NOT SETTLE AT A MEDIATION, DOES THE MEDIATOR MAKE A RECOMMENDATION

TO THE COURT OR TO THE PARTIES?

No. Under the Act, the mediator is a facilitator, not an evaluator. The mediator does not render a decision or make a recommendation to the court or the parties.

IS MEDIATION BINDING UNDER THE ACT?

Under the Act, mediation is non-binding unless all the parties specifically agree otherwise in writing. If, as a result of a mediation, the parties agree to settle and reduce the settlement to writing, the agreement is enforceable as any other transaction or compromise. Mediation should not be confused with arbitration. Arbitration is a dispute resolution process where the neutral party, the arbitrator, renders a decision that is usually binding on the parties.

ARE LAWYERS NOW REQUIRED TO ADVISE THEIR CLIENTS OF THE PROPRIETY OF USING MEDIATION?

While the Act stops short of requiring counsel to advise clients of the propriety of using mediation, the Act does encourage counsel to discuss with their clients the appropriateness of using mediation in any civil case pending in the courts. Because of this "encouragement" by the Act, lawyers should educate themselves about the advantages and disadvantages of mediation and advise clients accordingly. A corollary issue is whether a lawyer has a duty to inform his client that an opposing party has suggested the use of mediation as a method of resolving a dispute. The Act does not answer this question. However, the encouragement provided by the Act coupled with a lawyer's ethical duty to "keep a client reasonably informed about the status of a matter"[4] would indicate that a lawyer has such an ethical duty. Consequently, the author "encourages" lawyers to not only learn about the benefits of mediation but also to talk with their clients about the propriety of using mediation.

HOW MUCH DOES A MEDIATION COST?

The cost of a mediation depends on such factors as the number of parties involved, the complexity of the case and the amount in dispute. In Louisiana, most mediators charge an administrative fee and an hourly fee for civil mediations.[5] The administrative fee covers ministerial costs such as:

> the scheduling of the mediation;

> the provision of lunch, beverages and other refreshments;

> long distance phone costs; and

> copy costs and other incidentals.

The hourly fee compensates the mediator for each hour that he or she spends in the mediation. Currently, in Louisiana, administrative fees range from between $300 to $400 for a two-party case and the mediator's hourly fee is usually found to be between $150 and $200 per hour. In cases where there are multiple plaintiffs or defendants, parties should expect to pay more than the costs mentioned above. Contingency fees that are related to the amount in dispute or the final settlement amount are generally viewed as unethical.

HOW LONG DO MEDIATIONS LAST?

Most civil mediations begin and end in the same day.[6] Some mediations may be completed in three to four hours while others may take eight to 10 hours to complete. In complex cases with multiple parties, it may take several days to complete a mediation. This is particularly true when class action cases are mediated.

WHAT IS THE BEST WAY TO FIND A GOOD MEDIATOR?

Ask around. Mediators have different experiences and approaches to mediation. Mediators have different backgrounds and training. Before selecting a mediator, you should consider the following questions:

***102** > How many mediations has the mediator conducted?

> Will the mediator evaluate the case and give an opinion?

> Has the mediator mediated a case of this type before?

> What expertise and experience does the mediator have in a case of this type?

> What mediation training has the mediator received?

In selecting a mediator, you should consider the mediator's training, experience and credentials. Another important consideration is whether the mediator has knowledge of the subject matter. Questions about these matters and other relevant subjects should be asked of the mediator directly or the mediation firm that administers the mediation. For example, a mediator in a construction case should have familiarity with the construction process, knowledge of statutes affecting claims and disputes in construction cases, as well as skill in conducting mediations in construction cases. You should obtain a biography from all prospective mediators prior to your final selection of a mediator.

WHAT ROLE DOES THE CLIENT PLAY IN A MEDIATION?

The mediation process is for clients. It is their day in court. Consequently, you should throughly prepare the client for the mediation to ensure that the full potential of the process is achieved. To prepare the client for a mediation, you should meet personally with him to discuss in detail the manner, length and substance of the opening presentations, the joint session, the caucus and the closure of the mediation. You also should explain the negotiation process to the client, that a mediation is a structured negotiation, and that there will be many offers and counteroffers exchanged at the mediation. Prior to the mediation, the client should be aware of the strengths and weaknesses of his case as well as those of his opponent. You also should inform the client that a good mediator will explore those strengths and weaknesses during the mediation. Finally, you should inform the client that most cases that are mediated settle, that he should be patient and that he should allow the process to work for him.

ARE THERE ANY ETHICAL STANDARDS GOVERNING THE CONDUCT OF MEDIATORS IN LOUISIANA?

There is no code of conduct for mediations that are not conducted under the Act. As mentioned earlier, the overwhelming majority of mediations in Louisiana will not be conducted pursuant to the Act. For those few mediations that will be conducted under the Act, the ethical code entitled "The Standards of Conduct for Mediators" adopted by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution applies to the professional conduct of mediators appointed under the Act. Since the Louisiana Legislature has adopted the Standards of Conduct for Mediators at least in a limited capacity, it may be appropriate for all mediators in Louisiana to govern themselves by that code.

WHAT HAPPENS TO THE PILOT MEDIATION PROGRAMS IN THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS AND IN THE FIRST CITY COURT OF THE CITY OF NEW ORLEANS?

Under the Act, both pilot mediation programs will continue in their present forms uninterrupted until Aug. 31, 1999. The rules of the pilot programs take precedence over any provisions of the Act which are inconsistent with the rules. The Act also requires the ADR Section of the LSBA to study the pilot mediation programs and issue its report to the Louisiana Legislature before the commencement of the 1999 Regular Legislative Session.

DOES THE ACT PROVIDE FOR THE CONFIDENTIALITY OF MEDIATION PROCEEDINGS?

Yes. With limited exceptions, all mediations conducted in Louisiana, those conducted under the Act and those private mediations not conducted under the Act, are confidential. All written and oral communications and records made during any mediation, whether before or after the institution of formal judicial proceedings, are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding. Further, the parties, counsel and other participants in a mediation shall not be required to testify concerning the mediation proceedings and are not subject to process or subpoena, issued in any judicial or administrative procedure, which requires the disclosure of any communications or records of mediation. The exceptions are that:

(1) a mediator may report, pursuant to court order, whether the parties appeared as ordered, whether the mediation took place and whether a settlement resulted;

(2) the disclosure of communications ***103** and records made during the mediation may be made by any participant in the mediation in connection with a motion for sanctions made by a party to the mediation based on a claim of a party's

non-compliance with the court's order to participate in the mediation proceeding; and

(3) when necessary to prevent fraud or manifest injustice, the disclosure of communications and records made during the mediation may be made by any participant in the mediation in a judicial determination of the meaning or enforceability of an agreement resulting from a mediation procedure.

CAN THE PARTIES THEMSELVES WAIVE THE CONFIDENTIALITY OF THE PROCEEDINGS WITHOUT THE MEDIATOR'S CONSENT?

No. Under the Act, confidentiality may be waived only when all parties and the mediator specifically agree in writing.

Footnotes

a1 Note 1. *Bobby Marzine Harges is a professor of law at Loyola University Law School where he teaches mediation and arbitration, evidence and torts. He is a graduate of Harvard University Law School and the University of Mississippi Law School. He is chair of the Louisiana State Bar Association's Alternative Dispute Resolution Section, a member and past co-chair of the Alternative Dispute Resolution Committee of the Mississippi Bar and a member of the Family Mediation Council of Louisiana. An experienced mediator and arbitrator, he is a member of the panel of mediators of ADR inc. and the American Arbitration Association. He also is a member of the Task Force for the Orleans Parish Civil District Court Pilot Mediation Program and the Louisiana Supreme Court ADR Study Group. (7214 St. Charles Ave., Box 901, New Orleans, La. 70118)*

1 La. R.S. 9:4103(A) states: "On motion of both parties, a court may order the referral of a civil case for mediation."

2 La. R.S. 9:4103(A).

3 House Bill No. 2347 was a substitute for House Bill No. 660. Under House Bill No. 660, as initially introduced, the court, on its own motion or on the motion of a party, could refer a pending dispute to mediation, non-binding arbitration or any other alternative dispute resolution system established pursuant to state law or contract.

4 Louisiana State Bar Association Rules of Professional Conduct, Disciplinary Rule 1.4, Communication.

5 In domestic relations mediations in Louisiana, payment is usually made at the mediation. This is because most mediators charge by the hour utilizing the therapeutic model where each mediation session usually lasts for one or two hours per week. With the parties knowing in advance how long the session will last, they are required by the mediator to make payment at each session. In court-appointed child custody mediations in Jefferson Parish, the Family Mediation Council of Louisiana, Inc. offers reduced fee mediations on a sliding scale that depends on the combined income of the disputing parties.

6 In child custody and visitation mediations, the mediation sessions may take place over a series of weeks or months because most mediators utilize the therapeutic model where each mediation session usually lasts for one or two hours per week.