

CHAPTER 13

UNTAPPED POTENTIAL: CREATING A SYSTEMATIC MODEL FOR MEDIATION PREPARATION

*Betsy A. Miller and David G. Seibel**

Most experienced practitioners prepare their client for mediation, but not systematically. A systematic approach to mediation preparation results in better substantive outcomes, a more efficient process, and a template for application to any kind of case. Is your method of preparing your clients for mediation effective?

Consider our recent informal survey of 30 experienced litigators about how they prepare for mediation. Nearly all said that they discuss speaking roles and settlement authority with their clients. Almost none said they spend more than an hour or two preparing specifically for the mediation process.

We also asked whether they prepare questions to ask prospective mediators before appointment, and questions for the adversary during the mediation. Finally, we asked if they strategize about the most appropriate moment to reveal an opening financial demand or counteroffer.

The overwhelming response to these questions was no. This suggests that much needs to be done to educate litigators and others about preparing systematically for mediation.

In the 1980s, Roger Fisher introduced a simple framework for negotiators to use that focused on improving substantive results without placing undue strain on the parties' relationship. The key to the *Getting*

* Betsy A. Miller is a Partner in the Public Client Practice at Cohen, Milstein, Sellers & Toll PLLC in Washington, D.C., where is a litigator, mediation coach, and settlement consultant. Since 2001, Ms. Miller has been an adjunct professor at Georgetown University Law Center, where she teaches courses on negotiation and mediation. She has taught at the Harvard Negotiation Institute (formerly called the Harvard Program for the Instruction of Lawyers).

David G. Seibel is a Co-founder and President of Insight Partners and Insight Collaborative, both international conflict management firms. A mediator, mediation trainer and consultant, he teaches at Harvard Law School's Program on Negotiation.

to Yes approach was systematic preparation. It worked because it minimized the likelihood that the negotiators would engage in unproductive conduct that could cause the negotiation to fail. The systematic preparation model also refined the negotiators' skills, and gave them the confidence needed to develop creative solutions that would result in a better overall deal.

In this article, we advocate an adaptation of this systematic approach. It involves having one or more formal mediation preparation sessions with clients at which key issues are discussed and strategies developed. These sessions can prevent mistakes at the mediation table, ensure that your client's goals are conveyed to the mediator and the adversary, prepare you to support your client's offer or demand with objective criteria, and improve your ability to obtain information needed to understand the other side's offers and respond appropriately.

I. Some Key Issues in Mediation Preparation

A. Uncovering the Client's Goals

Does your client know what he or she wants to get out of the mediation? Systematic preparation helps clients identify their goals and concerns for a particular dispute. Sometimes, a client's primary desire is to punish the other side. Punishment for wrongdoing can be a reasonable purpose, but it often masks other important goals. For example, in a case where public, judicial precedent is not the desired outcome, it is important to determine how important confidentiality and protecting reputation are in relation to other priorities. Clients and their representatives can lose sight of interests, such as doing future business with the other side, promptly resolving the dispute, and minimizing legal costs, when preparation is neither structured nor comprehensive.

The way the client's goals are prioritized should influence your actions in the mediation. For example, if you learn that confidentiality is an important concern, you should plan to negotiate more detailed ground rules about privacy with the mediator and other side. You might draft these ground rules before the mediation and be prepared to explain the reasons you want them in a way that will be credible to the other side and the mediator. If your client has an interest in an ongoing relationship with the other side, you should counsel your client on how to avoid positional demands or behavior that would irreparably damage the parties' relationship.

B. True Inquiry: Questioning the Mediator and the Other Party

Think about your last mediation. How much time did you spend before selecting the mediator thinking about what mediator style (i.e., facilitative or evaluative) would work best for this particular dispute? Did you prepare a list of questions to ask the prospective mediator? Did you ask whether his or her style is more evaluative or more facilitative? Did you ask how much time he or she spends in joint sessions versus private caucuses? Before selecting the mediator, did you explain the pros and cons of the facilitative versus evaluative approach to your client?

When selecting a mediator, many litigators focus only on whether the candidate has experience in the specific subject matter of the dispute. This narrow inquiry produces no information about the mediator's skills as a facilitator, communicator, or consensus builder. If the selected mediator's only strength is experience with technical issues, you may have missed the chance to appoint the most suitable mediator to address the client's desire for a comprehensive resolution that includes more than just a legal "reality check" on the substantive issues.

Many practitioners spend too much time during mediation advocating their clients' views. In the mediation courses we teach, we ask our students to guess the percentages of time a persuasive communicator should spend (a) trying to convince the other side to see her viewpoint, and (b) asking the other side questions. Most students guess 50% for each activity. However, our experience suggests that the most persuasive communicators spend only about 10% of the time advocating their viewpoint, 10% empathizing with the adversary (to demonstrate that they understand the other side's viewpoint), and 80% asking questions designed to obtain additional information about the adversary's perspective.

If you spend the majority of your time in mediation advocating, you are wasting an opportunity to learn information essential to a satisfactory and swift resolution of the dispute. Systematic preparation should include preparing the exact questions to be asked in mediation, especially regarding the other side's interests, considering how each party prioritizes its interests and what options might satisfy some or all of them. Systematic preparation also involves experimenting with the wording of your questions and opening statement, and trying to anticipate the worst possible reaction from the other side. Taking the time to think about this ahead of the mediation allows you to revise the wording to minimize any kind of adverse reaction.

C. Think About What You Say, and When and How to Say It

How often have we heard the other side say something offensive or absurd? Well, the other side thinks the same about what we say, unless we carefully and diplomatically communicate our concerns. Mediation participants often begin the mediation session with extreme demands and offers, just to set the tone that they won't concede easily. This locks the parties into positions that are difficult to leave behind in favor of a more productive conversation.

During a preparation session with the client, discuss what tone of voice is most likely to encourage genuine discussion of the substantive issues and possible means of resolving one or more of them. Be sure to highlight the likely impact on the other side of expressing aggression, attacking the other party, and making extreme claims.

Teaching the client to participate appropriately at the mediation should dispel any worries about walking into the mediation session and seeing and talking to the other side. Hearing your well-prepared client, the other side should feel more at ease with the decision to mediate. This will enable both parties to concentrate on the substantive issues.

During the preparation session you should also edit any formal opening statement that you or your client will make at the mediation to ensure that the stated goals are reasonable and can be justified based on objective standards.

In addition, spend as much time as necessary to anticipate questions from the mediator or other side and prepare your answers. As a result of this intense preparation, the mediator should be able to lead the parties through a gradual and reciprocal exchange of information that could uncover a rich vein of possible settlement options, without over-exposing the vulnerability of either side.

D. Identifying the “Why” Behind the Offer or Demand

Systematic preparation for mediation also involves teaching the client how to respond when the other side makes a demand or offer during mediation. Whether the offer or demand is made directly by the other side at a joint mediation session, or through the mediator in private caucus, you should always find out *why* the other side wants a particular option.

If you never ask yourself or the other side “why,” you will be limited to framing a response based on very little information. You could decide to accept or reject an offer from the other side, or you could make a

counteroffer. But unless you ask what is motivating the offer, you will never know whether any particular counteroffer is appropriate or necessary.

E. Use Objective Criteria as a Sword and a Shield

Objective criteria are standards that the other side might view as reasonable or fair. Typically created by impartial third parties for analogous situations, they include, for example, industry practice, case law, and precedent. Providing objective criteria in support of a position or offer can help ease the conflict between the parties and curb the instinct to automatically reject an adversary's demand or offer. Such criteria provide a neutral backdrop against which the parties can calmly analyze options in mediation. Mediators often use objective criteria when the parties cannot agree on what is fair.

To come up with objective standards in mediation, brainstorm with your client during a systematic preparation session. You should identify as many objective standards as possible (not just the most obvious) to support your client's preferred outcome. You should also work with your client to anticipate the objective standards that might be asserted in support of the other side's preferred settlement options, and devise credible arguments—using the standards you and your client have identified—to explain why the other side's suggestion is not as persuasive or reasonable as yours. Going through this process can give you a strategic advantage at the mediation and minimize surprises.

II. Conclusion

Mediation is an opportunity to escape the traditional haggle. The systematic preparation model allows you to make the best use of that opportunity. The preparatory steps highlighted here—identifying the right questions to ask the mediator and the other party, drafting and rehearsing what you and your client plan to say, and preparing reminder notes for the mediation (especially to systematically ask for the “why” behind every offer and demand) are among the most important steps to remember.

Investing time to prepare systematically for mediation can optimize the substantive results, save time and salvage relationships. For experienced practitioners and clients, it should also harness and improve the skills they already have. Both can use the building blocks discussed

here to design a mediation preparation framework that suits their individual styles.

Achieving a favorable settlement depends as much on the skill and preparation of the parties and counsel as it does on the abilities of the mediator. The key to building mediation expertise is preparing in a way that can be replicated and adapted for each new mediation challenge.