# Practicing in the 'Age of Mediation'

PART 2

Part 1 discussed mediation in general. Part 2 delves into the preparation for and attendance at the actual mediation session.

By Louis C. Schmitt Jr.

Mediation early in the litigation process (perhaps even prior to the filing of suit) may be appropriate in some situations. It potentially avoids the cost of future litigation. It also keeps the dispute private. Additionally, a successful outcome to the mediation may be more likely early on, before the positions of the parties are hardened by discovery and pre-trial processes and before the parties have invested additional financial (and perhaps also emotional) resources into the case, with such investments potentially committing them more and more to the ongoing dispute.

There are a number of times during the case when the parties may be especially amenable to attempting resolution through the mediation process:

- After the filing of preliminary objections or a motion to dismiss with regard to some or all of the plaintiff's claims;
- When there are pending discovery requests that will lead to one or both parties incurring significant expense or which seek the disclosure of sensitive information;
- When one or more discovery motions are pending that may do the same;
- After the close of discovery;
- After the filing of a motion for summary judgment;
- After the filing of a motion in limine on a key evidentiary issue;
- As the trial date nears.

You can probably come up with a number of other examples. Suffice it to say that any time a crucial point is about to be reached in the case is a good time to consider resolving the matter by way of mediation.

## Who Should Attend Mediation?

Ideally, everyone who has a stake in the outcome of the mediation should be present if at all possible. That includes parties, counsel, insurance representatives and lien holders, among others. In reality, it is often not feasible to get all of the interested parties to attend. As a mediator I expect that the parties and their counsel (with settlement authority) will personally participate in the mediation session. I also expect that other stakeholders not present will be made aware of the mediation ses-

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sion and will be available if necessary to participate in a meaningful way by telephone during the session.

## How to Prepare

The first thing to do is to let your client and any other stakeholders on your end of things know of the proposed mediation time, date and location in order to determine whether they can either attend in person or be available by telephone during the entire session. Try to get the cellphone numbers, alternative telephone numbers, if possible, and email addresses of anyone you may need to contact while at the mediation.

If you are representing the plaintiff and there are liens that need to be satisfied, attempt to find out in advance of the mediation how much any and all lien holders would be willing to take by way of compromise. If that isn't possible, find out whether a representative of the lien holder is available to attend the mediation; if not, at least get contact information for the representative and that representative's supervisor, if possible.

As a mediator I always want the insurance adjuster to attend the mediation, if at all possible, for a number of reasons: First, because the adjuster has settlement authority and can request more if warranted. Second, because I prefer to talk face to face with the insurance company representative during the mediation. Third, it shows a commitment to the mediation process by the insurance carrier. Fourth, it allows the representative of the insurer to see and hear the plaintiff.

If you are defense counsel and an insurer is involved and a representative of the carrier will not attend the mediation in person, it is a good idea to have contact information not only for the assigned adjuster but also for the adjuster's manager. Nothing brings mediation progress to a halt faster than the inability of defense counsel to contact the insurance adjuster. If the adjuster is incommunicado, having the contact information for a claims manager can make all the difference in keeping things moving.

Whether on the side of the plaintiff or defense, it is vital to discuss with your client the potential outcomes at the upcoming mediation. Explore the parameters within which your client is willing to resolve the matter. Then work with your client to come up with a strategy for getting there. And make sure you have everything you may have to provide to the mediator and/or the other side in order to support that strategy.

Last, but not least: Know your case! Make sure you are as familiar as possible with the legal and factual details of the dispute. The mediator will never be able to know those details as well as the parties themselves and will no doubt have questions. The other side may also have some questions. Be prepared with answers.

## What to Provide to the Mediator in Advance

Either prior to or at the mediation, your mediator will ask that you and/or your client execute a proposed written agreement to mediate. Read it! It usually sets forth the rights and responsibilities of the parties and the mediator with regard to a number of issues relating to the mediation process.

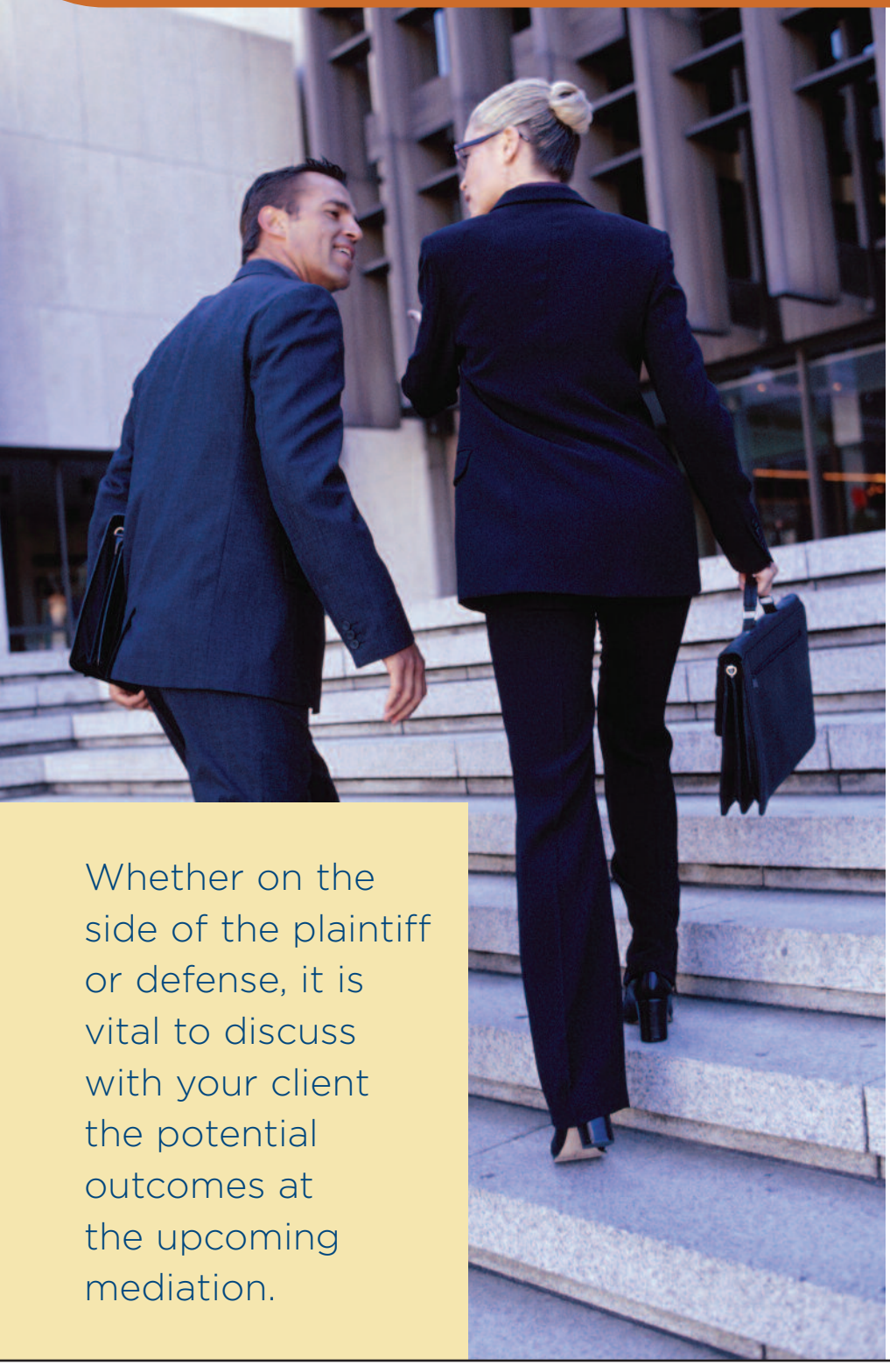
Most mediators will advise that counsel are free to submit some form of documentation to the mediator in advance of the session and will usually set a deadline for doing so. Some require it. I know of none who would refuse such a submission.

The pre-mediation submission usually will take the form of a mediation memorandum and any necessary supporting documentation. When it comes to your submission, make clear whether it is to be kept confidential. Try to keep your memorandum informative — as opposed to argumentative. Give the mediator the general flavor of the dispute and highlight important and/or unusual legal or factual issues. Don't saddle the mediator with unnecessary details. If you truly have to submit voluminous documentation to the mediator, a binder is a good idea. In that case, tabs and an index are helpful.

## What Procedure Should Be Followed at the Mediation

The process followed at the mediation session can vary greatly depending on circumstances. In general, however, the mediation will usually involve some if not all of the following:

1. The initial gathering and introductions of the mediator, parties, counsel and other attendees;



Whether on the side of the plaintiff or defense, it is vital to discuss with your client the potential outcomes at the upcoming mediation.

2. An opening statement by the mediator that provides some information about the mediator and briefly explains the mediation process;

3. Opening statements of the parties (provided by counsel and/or the parties themselves);

4. A joint session where questions are posed and nonconfidential matters are discussed;

5. Adjournment by one or more parties to an area where private meetings can take place during the remainder of the session;

6. Private meetings between the parties and the mediator;

7. A joint session to confirm the details of the resolution and execute documents memorializing the terms thereof or, in the alternative, to confirm an impasse;

8. Final adjournment.

### Make an Opening Statement?

Yes. It is your chance not only to present your side of the dispute to the mediator but also to talk directly to the other side. Be informative. Don't attack your opponent; that usually just begets a defensive response and is therefore counterproductive.

If you represent the plaintiff, have your client talk to the mediator and the opposition about the personal impact of the injuries and damages sustained. If you have a plaintiff who is willing to tell the story of the case (some are not comfortable in doing so), just let that happen. This not only presents the plaintiff's position but can also be cathartic for the plaintiff, which often enhances settlement prospects.

If you represent the defense, it is a good idea in your opening at least to acknowl-

edge the plaintiff's position and indicate a genuine willingness to consider that position in moving forward. You don't have to agree with the other side's position. Simply acknowledging it can help to get things off to a good start.

## What to Do and Not Do at the Mediation

Keep in mind that mediation is not trial! Being adversarial won't score you any points with the mediator and will likely alienate your opposition. Mediation is designed to be more collaborative than confrontational.

- Listen. Listen. Listen.
- Be polite and considerate to everyone present. You can still make your points in a respectful manner. Doing so will go a long way toward maintaining a positive atmosphere and may actually help bring about agreement.
- Be helpful. If the mediator or someone on the other side has a question or needs something that you can provide, don't hesitate to be of assistance.
- Maintain your sense of humor. The dispute should be treated seriously. The process is a serious one. The attendees should be taken seriously. But don't take yourself too seriously. Appropriate humor can be a great stress releaser/reliever.
- Stay focused and committed. Don't go around telling attendees that the mediation won't work. Don't play electronic games or spend time talking with others on your phone or cleaning out your email. Don't tell the mediator how stupid the opposing party and/or counsel is. If a break is taken, make sure you return punctually. Put your cellphone on vibrate or better yet turn it off, especially during joint sessions.
- Remember that the mediation process is flexible. If you have to speak to the mediator one-on-one, just ask. If you want to meet with the mediator and a representative of the opposition, that can be arranged. You can even ask to speak directly with the other side outside the presence of the mediator.
- In private meetings make very clear to the mediator what can be shared with the opposition and when — and what is to be kept confidential.
- If appropriate, consider having your client make a sincere apology during a joint session. Pursuant to 42 Pa.C.S. Section 5949, all mediation communications are privileged and may not be disclosed through discovery, so evidence of the apology would be inadmissible at trial if the mediation is unsuccessful. And you might be amazed at the positive effect an apology can have on the dispute.
- Don't bluff. In trying to bring about a resolution, the mediator is relying on the truthfulness and accuracy of what you say. If you tell the mediator you are at your bottom line and ready to walk, the mediator and the opposition will have to take you at your word. If it turns out that you were merely posturing, you will not only have lost credibility with the other side, but you will also have made things much more difficult for the mediator.
- If an agreement is reached, make certain that a memorandum of understanding is prepared and signed *at the mediation*. This memorandum should set forth the essential terms of the settlement. Copies should be provided to all parties and counsel in attendance.
- Last, but certainly not least, have faith in the mediation process. It works, though not always and sometimes not right away. But it directly or indirectly brings about resolutions more often than you might think. Just give it a chance. You have nothing to lose. And your clients will benefit. ✦

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