MEANINGFUL MEDIATION
A Strategy to Make the First One Count

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> An Attorney at Law is a highly useful and honorable officer of our Courts of Justice, and his principal duties are, to be true to the Court, and to manage the business of his clients with care, skill and integrity.
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> *Day v. Adams*, 63 N.C. 254 (NC 1869).

Most construction mediations follow a typical path – the parties show up for the day of mediation, joint session presentations are made, and private caucuses follow with the goal of reaching a negotiated resolution. Little is done in advance of the mediation to prepare. Instead, the parties explain for the first time to the mediator and sometimes to the other party the basis of their complaint or defense during the joint session presentation. For even a basic two party construction dispute, the typical path of "education first, then negotiation" can take hours, lead to acrimony and potentially frustrate the mediation. These types of mediation often completely collapse if there are multiple parties involved.[1] Instead, typical multi-party mediations are adjourned for another round or impassed only to be later rescheduled at the direction of the court. Frustration abounds and costs skyrocket. Thus, the better course of action would appear to be to make the first mediation count. The obvious question is "How?"

I. *Mediation – More than just a Concept*

> … *to* ***manage*** *the business of his clients with care, skill and integrity.*
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> *Day v. Adams, supra.*

Before the question of how to make the first mediation effective is answered, the conceptual basis for mediation should be understood. Mediation is more than simply another hurdle the parties must cross on the way to trial (arbitration). Rather, mediation is a natural

extension of the pretrial process and should be viewed as inherent in the duty to "manage the business" of the client.[2] Trial wrests from the client the ability to decide the outcome of a dispute and hands it over to a disinterested third party (judge, jury or arbitrator). Before taking that final step, clients must be educated about all of the associated risks and make a deliberate decision to proceed nonetheless. Thus, mediation is not mutually exclusive with trial; instead, it is a fundamental component of proper preparation. Mediation affords the opportunity to crystalize the dispute, focus the client on the risks, and create in the client the ability to choose between proceeding to trial or settling and limiting (if not fixing) the risk of loss. Quite simply, mediation is opportunity.

Too often, however, the perception of what it means to be a zealous advocate overshadows what is in the best interest of the client. "Winning" the debate or the dispute becomes the focus, not what may be truly best for the client. Yet, if "winning" means that the costs eclipse the result, the best interests of the client have not been served.[3] Accordingly, to "manage the business" of the client, attorneys should reflect on the professional responsibilities they have accepted as they prepare for and participate in mediation.

> As a representative of clients, a lawyer performs various functions. As an **advisor**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an **advocate**, a lawyer zealously asserts the client's position under the rules of the adversary system. As a **negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an **evaluator**, a lawyer acts by examining a client's legal affairs and reporting about them to the client or others. (Emphasis added)
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> Preamble: A Lawyer's Responsibilities, Chapter 4. Rules of Professional Conduct, Rules Regulating the Florida Bar.

If attorneys are going to do more than merely pay homage to these four roles – advisor, advocate, negotiator and evaluator – attorneys should embrace what mediation represents and provides – the opportunity to be of service to the best interests of the client.

II. Evaluate, Advise, Advocate and Negotiate

The answer to "what makes a successful mediation" is simple – preparation. If the parties are prepared (and motivated) and the mediator is prepared (and engaged), the likelihood of a negotiated resolution increases substantially. Conversely, lack of preparation usually leads to a lack of organization and from there the mediation often devolves into chaos. For complex, multi-party mediations, preparation is more than a good idea; preparation is essential if the mediation is going to be given any chance for success. Yet, many parties fail to consider certain indispensable factors to properly prepare for mediation.

First, attorneys must critically evaluate their case. To do that, attorneys and their clients must appreciate and understand not only their own position, but also their opponents. What are the reasoned theories of liability and the associated damages? Second, attorneys must advise their clients on the risks associated with proceeding with the case as opposed to settling. Further, attorneys must advise their clients on what it will take to be prepared to mediate; i.e., requisite levels of authority necessary to negotiate a resolution. Third, attorneys must advocate their clients' position to the other party(ies) in advance of the mediation. Theories of liability and associated damages or defenses thereto should be known and documented prior to coming to mediation.

While "decision makers" are required to attend mediation, the reality is that decisions are not made spontaneously or in a vacuum, particularly in business litigation. Instead, internal committees within or on behalf of a party evaluate respective positions and establish ranges of

authority for settlement. Without the required information being made available to evaluate, a party will come ill-prepared to participate in the mediation. A cautionary comment is warranted at this juncture. "Required information" does not mean all things "reasonably calculated to lead to the discovery of admissible evidence;" rather, it is sufficient information to allow a reasonable evaluation of the associated risks.

Fourth, attorneys and their clients must be prepared to negotiate; i.e., have a willingness to compromise recognizing the risks associated with continuing the litigation. Simply attending mediation is not negotiation. Rather, negotiation is a collaborative process whereby the parties work together to reach a resolution which is reasonable to all.

III. How to Prepare – *It's all about the Plan.*

Preparation for mediation is akin to preparation for trial. There is no exact formula and it often involves hard work, but it should begin with a plan. Without a plan, working hard to prepare is simply working hard. To plan, consider the goals to be achieved through preparation.

1st – You, as the attorney, are ready.

2nd – Your client is ready.

3rd – The other side(s) is ready.

4th – All parties come to the mediation with actual authority to settle, not just apparent authority.

5th – The correct mediator is selected and is ready.

The plan should then reflect the effort necessary to achieve each of those goals in advance of the mediation.

1st – Are You Ready?

Lawsuits are made up of two basic components – liability and damages. For the attorney to be ready for mediation these two basic components must be appreciated and understood. But

as easy as that is to say, it represents an extraordinary task. The lawyer, though trained in the law, must now become an expert in the client's business. It is not enough to simply parrot what a client has relayed; the lawyer must be able to recount the dispute and the associated facts. The lawyer must evaluate those facts and the dispute in accordance with the applicable law.[4] Further, that evaluation must be done impassionately with an eye for advising the client as a counselor. The time for advocacy will come if a negotiated resolution is not reached. Finally, the lawyer must assess the risks. Not just the risk associated with winning or losing; but the risk of continuing the dispute to the overall detriment to the client. Perform those tasks and you are then ready to mediate meaningfully.

2nd – Is Your Client Ready?

Most clients are not in the business of pursuing or defending against disputes. They come with preconceived notions that trials are about justice and vindication, as opposed to simply making a determined outcome. Yet most commercial litigation is simply about money; who wants how much from someone else for some stated reason. If a lawyer allows the client to proceed to mediation with a misconception about the abilities of the legal system to satisfy their non-monetary desires, the client will be quickly disappointed as the mediation unfolds. However, it is not enough to simply land on the client an evaluation of the dispute moments before mediation begins.[5] Rather, the lawyer is best served by bringing the client along with the evaluation as it is being performed. If done correctly, the client reaches the "right" conclusion (whatever right may mean) by being guided, rather than directed by the lawyer.[6]

3rd – Is Your Opposition Ready?

It seems an anathema to suggest that an advocate do anything to assure that his opponent is prepared. Yet more than one seasoned trial lawyer has said that they would rather have a

skilled, prepared opponent than a weak one. Trials are difficult enough; why waste time with inane positions and interminable examinations?[7] More importantly, in the context of mediation, if your opponent is not prepared, how will they conceive of the weakness of their position and the strength of yours? More practically, if you are the plaintiff, how do you expect the defendant to pay if they do not know how much you want and why? If you are the defendant, why would you leave your defenses a mystery if you want the plaintiff to lower its demand? For mediation to be a success, both parties must be prepared to appreciate and understand the strengths and weaknesses of the respective positions.[8] Accordingly, if there is some component of damages or some element of defense (for example) which will aid in a clearer picture of the dispute at issue, consider carefully whether it should be shared or held back as some part of perceived trial strategy.

4th – Who Has Authority?

Authority to settle does not mean that a party will settle. Nor does it mean that a party has failed to participate in good faith if they decline to settle. Rather, it represents an ability to decide, when the moment arises, whether it is worthwhile to resolve the dispute at the amount proposed. In the context of most commercial mediation, levels of authority are set well prior to mediation. Unfortunately, those authority levels are often set in a vacuum without the benefit of an understanding of the other party's perspective. Further, they are often set before the mediator has an opportunity to fully explore the boundaries of risk associated with continuing the litigation. As a result, a false floor or ceiling, respectively, is often set which can lead to disappointment by the client (which translates into disappointment in counsel) and severely hamper the ability to resolve the dispute the day of mediation. While the practical reality remains that parties should and will discuss levels of authority prior to mediation, levels of

authority should be guide posts and not fixed positions. Further, if the dynamics of mediation are going to be addressed timely, the person with ultimate authority needs to be present and not on the telephone a thousand miles away.[9]

5th – Do You Have the "Right" Mediator?

Mediation is opportunity – the opportunity to resolve the dispute for the benefit of the client. But to get there, requires the parties to focus on the dispute at issue and explore the boundaries of risk associated with continuing. If the mediator is to be nothing more than a runner transmitting demands and offers from one office to another, hire an auctioneer. If the mediator is to challenge the parties on their respective positions and to cause them to critically consider the risks, get someone versed in the type of dispute at issue. To be successful, mediation eventually transcends the facts and law at issue as it devolves into a more pure "business" resolution. But, if the parties spend their time educating the mediator, they are not focused on what mediation offers.

No mediator can satisfy everyone; that notion only leads to the disappointment of all. However, will you listen more to the mediator you participated in selecting or the one you told the other side to choose alone? While the parties control the process and reach a resolution in mediation through self-determination, the wrong mediator can be a spoiler frustrating the parties' mutual goal.

IV. Conclusion

Mediation is a process, not a day. It begins when the lawyer is first handed the dispute much the same way trial preparation should begin. While it has as a goal a negotiated resolution, it is not mutually exclusive to trial preparation. Yet, it is often overlooked or simply considered as another hurdle before trial. However, if lawyers are going to serve faithfully their

professional responsibilities, they must be more than advocates. They must be evaluators, advisors and counselors as well. To fulfill those obligations, whether in mediation or trial, begins with a plan. Plan well and the opportunity in mediation reveals itself. Plan poorly (or not at all) and trial is assured.

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[1] If a two party mediation takes 6 hours, does a 20 party mediation take 60 hours? It has, if not more.

[2] The term "litigation" is avoided here because it has attendant to it the connotation of churning; simply doing whatever the Rules of Civil Procedure allow rather than truly focusing on what it is necessary to advance a cause to trial.

[3] "Cost" means more than the attorney's fees and expenses associated with resolution of the case. "Cost" includes the distraction away from the client's business interests and loss of future business opportunities, among others.

[4] The "Law" is more than what is set forth in the statutes and cases. The law includes the terms and conditions of the contract which in construction includes the plans and the specifications.

[5] A "moment" can be days, weeks or months depending on the nature and complexity of the dispute at issue.

[6] One of the most difficult tasks a lawyer faces is the challenge of being both an advocate and a counselor. Clients often expect aggressive advocacy during the litigation, but complain mightily when they were not properly counseled if the results go awry.

[7] Plus, if you are going to have judge or jury snatch defeat from the jaws of victory, you would rather it be to a worthy opponent.

[8] "Appreciation" and "understanding" do not mean agreement. Rather, they connote a recognition that some third party trier of fact might misperceive your position and accept your opponents.

[9] A person with "authority" attending by telephone arises most often where insurance coverage is in play. However, Rule 1.720, Fla. R. Civ. Pro. set forth the requirements for attendance, though many times ignored.