A LAWYER'S "KNOWS" MAY LEAD TO "YES!"

By Myra L. McKenzie

In light of today's litigious society and heroic efforts to maintain reasonable court dockets, alternative dispute resolution techniques are increasingly used to resolve conflicts outside of court. Frequently, companies and courts are looking for a "yes" in response to the following questions: "Is the matter resolved? Has an agreement been reached?" Mediation is a forum through which those questions can be answered in the affirmative. While a mediator can assist the parties in understanding each other's positions and goals, lawyers must be armed with the information, tools, and tactics needed to be effective client representatives. In the words of 16th century philosopher Sir Francis Bacon, "Knowledge is power." Below are ten "knows" that can assist you in getting to the aforementioned "yes."

PRE-MEDIATION
1. Know the mediation's purpose. What is your "yes"? Is it settlement? If an internal or external complaint has been filed, you may be seeking resolution of the matter. Is it education? Some situations are not ripe for resolution because parties do not know what the "true" issues are. Another possibility is fulfillment of an administrative, contractual, or judicial requirement. Whatever the purpose, you should know it because it drives your preparation and representation.

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2. Know the mediator. Study the mediator's academic and professional profile. Review his or her resume. Ask colleagues about him or her. Try to detect any bias in light of publications, current employment, or mediation record. If you can pick the mediator, this will help you exclude those who are not good fits for your matter. If others make the choice, at least you are informed about the person who will guide you through the process.

3. Know how to craft an effective mediation statement. Mediators ask parties to submit position statements before mediations. Determine whether the mediator wants an objective or persuasive statement and draft one that complies with all instructions. Persuasive statements may be easier to write, but even if you are crafting an objective one, tell your client's "story" using strong, but accurate, action verbs and adjectives. Near the end, state what you believe a fair settlement might be. Additionally, to protect your client, include Rule 408 language indicating that the statement, as an offer of compromise, is inadmissible in court.

4. Know your client. Preparation is key! Conduct an appropriate number of interviews, read all known relevant documents, and be prepared to address any "bad" facts during the mediation. Determine what your client's true interests are. Question the client representative attending the mediation with you and listen to the responses. In addition, read relevant case law within your jurisdiction supporting your position. The more research and client preparation you do beforehand, the less scrambling you will have to do during the mediation.

5. Know your opponent's case. Again, preparation is key! To the extent possible, determine what facts the opposing party will rely on to support its position and be ready to respond. Also,
read relevant case law within your jurisdiction supporting the opposing party’s position and be able to distinguish it if needed. The more you know about the opposing party, the better able you are to serve your client.

6. Know your limits. When possible, establish the authorized maximum settlement amount before the mediation. This allows you to better plan your negotiating strategy. Furthermore, find out who can give you additional settlement authority and get a telephone number at which he or she can be reached throughout the mediation if the person will not be present. Agreeing to a settlement your client ultimately rejects is as bad as reaching a favorable settlement and having to walk away because you lack the authority to agree to the terms – neither yields a resolution.

**DURING MEDIATION**

7. Know how to listen. Reverse the time-honored adage that people have one mouth and two ears for a reason. Listen during opening statements. True interests may surface. Listen during caucuses. The mediator may give you key information from the opposing party and point out unrecognized weaknesses in your position. Further, your client’s actions and/or words may show you that his interests are slightly or vastly different from what you initially thought.

8. Know when to control your client. Determine when your client should speak. You may want to limit your client’s speaking when it angers the opposing party or when your client is revealing too information outside of caucuses. At the same time, you may want to let your client speak more if he can truly add value to the process. In some instances, he may be better able to explain certain policies or positions than you.

9. Know when to quit/know when to call. Part of good representation is knowing when to conclude. If you are rehashing issues without position movement or information exchange and your client is getting tired or impatient, you may need to end the session. Do not let the mediation deteriorate to a point where nothing can be done in the future to resolve the matter. Sometimes, parties may need more time to consider the offers made and the information gathered before making a decision.

   By the same token, if you are close to a resolution, you may need to call your client contact regarding additional authority. Making the call may get you the authority, but even if it doesn’t, it is a good will gesture that shows the other side your willingness to cooperate.

**POST-MEDIATION**

10. Know how to craft the final document. If you are able to get reach settlement, congratulations! When drafting the agreement be sure to include payment provisions, full or partial release of claims language, confidentiality or breach provisions, and any atypical or unique information related to the settlement. If you are not able to reach a settlement, you still have work to do. Draft a client letter or memorandum regarding the mediation session. Outline what you learned, give any final settlement numbers or gap, explain any duties you assumed, and ask for guidance on or offer suggestions for next steps. This will prove useful to your client as the matter progresses.

These ten “knows” are not fail-safe and should be tailored to fit the mediation styles or preferences of individual lawyers, but they can certainly give you a good start on the road to your client’s “yes.”

mmckenzie@porterwright.com

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