

TEN KEYS TO HAVING A SUCCESSFUL MEDIATION

MATT GLOVER



1. IT BEGINS WITH HAVING THE RIGHT MINDSET

- “Football is football and talent is talent. But the mindset of your team makes all the difference.” RGIII
- Have the mindset that your case is going to trial. If you are prepared for trial, you are prepared for an optimal resolution during the mediation process.
- Mediation is a *step in the process* towards reaching an optimal resolution. Mediation is not necessarily *the end stage* of your case.

2. MAINTAIN THE RIGHT IMPRESSION BY HAVING A WINNING ATTITUDE IN PRACTICE

- Is this case important to me? Perhaps even more important, does the opposition believe this case is important to me? The way you approach the case answers this question. The opposing side should know the case is important by the way you handle the smallest of details.

- “Most people get excited about games, but I’ve got to be excited about practice.” Pat Summitt
- Optimal resolution is the result of the way you approach practice. Did you approach motion practice with an attitude of seriousness? Written discovery? Depositions? It is hard to signal seriousness at mediation if you lack an attitude of seriousness at the stages leading up to mediation.

3. APPRECIATE UNCERTAINTY AS A MOTIVATING FACTOR

- Uncertainty is a motivator in resolution by settlement.
- How will the trial court rule on summary judgment? How will the trial court rule on evidentiary issues? What will a jury do with the case? What will an appellate court do?
- It is difficult to negotiate from a position of strength when facing a mountain of uncertainty.
- Uncertainty fades over time.

4. REMOVE UNCERTAINTY FROM THE PROCESS

- “Knowledge is Power.” Francis Bacon
- Knowing the details of your case removes uncertainty about the facts.
- Knowing the details of the applicable current law removes uncertainty.
- Knowing what a likely jury will do, by use of focus groups, helps remove uncertainty.

- Knowing where you stand on summary judgment removes uncertainty.
- Knowing the facts, law and likely outcome allows you to negotiate from a position of strength.

5. APPRECIATE FEAR AS A MOTIVATING FACTOR

- Attitudes inevitably change right before trial.
- **Insurance carriers are motivated the greatest when a belief “fear” exists that a judgment will likely be greater than available liability insurance limits.**
- Fear is increased over time.

6. CAPITALIZE ON THE ELEMENT OF FEAR

- Develop facts that increase the likelihood of excess exposure.
- Give insurance carrier opportunity to resolve without financial exposure to its insured.
- Make sure these efforts are well-documented.
- Enlist assistance of personal and/or corporate counsel to apply appropriate pressure to insurance carrier.

7. DON'T MISS AN OPPORTUNITY TO EDUCATE ALL DECISION MAKERS

- Don't rely on opposing counsel to educate opposing side on the strengths of your case. Share mediation position statement with opposing counsel and do so well in advance of the mediation.
- **Person with authority needs to be physically in attendance. You are doomed to fail if you allow otherwise.**
- Give an opening statement with an effective power point presentation. Incorporate critical documents and powerful video deposition clips.
- It is amazing how many times the decision maker is seeing this for the first time.

8. MANAGE EXPECTATIONS

- The ultimate indication of success is the overall satisfaction of the client.
- The process of managing expectations begins at the very first client meeting and continues until the end of the process. Either you define the expectations or the expectations will be defined by external forces.
- Education and honesty are critical components of properly managing expectations.
- Don't leave the client guessing about the process.

9. BE PROACTIVE WITH A NEGOTIATION STRATEGY

- Have the right goal. A targeted resolution vs. maximizing authority.
- If it is too easy, you are not doing something right.

- Don't be predictable.
- Take control.
- Walking away from the negotiation is often necessary. It is not a sign of failure. Remember—mediation is often a process, not a final destination.
- Preserve integrity. This will not be the last time you negotiate.
- Maintain positive relationships.

10.LEARN FROM PAST MISTAKES

- “You build on failure. You use it as a stepping stone. Close the door on the past. You don't forget the mistakes, but you don't dwell on them. You don't let it have any of your energy, or any of your time, or any of your space.” Johnny Cash
- Mistakes will happen, but the key is to keep from repeating and learning from the ones you make. You will learn more from your mistakes than from your successes.
- Welcome criticism.
- Learn from others.
- Examine the mistakes. What was the root cause? Did the mistake happen because you failed to incorporate one of the keys of success?