

[How to approach mediation](#) was the subject of an interesting blog entry by Michael Maslanka, the managing partner of the labor & employment law firm, Harrison & Ford in Dallas. I don't agree with everything he writes, but his thoughts are a helpful contribution to lawyers and clients trying to resolve disputes. Many of his thoughts hit the bulls eye, and all of his thoughts ought to be considered when preparing for mediation.

Maslanka, an employer side lawyer, calls mediation "such a frustrating experience for employers often untethered from reality." Mediation should never be frustrating. Sadly, however, mediation often frustrates more than it accelerates resolution. But the frustration with mediation that Maslanka cites is not limited to employers. It is shared just as much by employees.

An implicit point made by Maslanka is that preparation improves mediation. Preparing for mediation is perhaps one of the least understood parts of an employment lawyer's practice. No two mediations are the same, and their fluid nature makes formula preparation difficult to identify for lawyers. Nevertheless, Maslanka offers five worthy points. They also prompt me to expand them and offer my own points of clarification and sometimes, disagreement.

Here are my five essential steps for how to prepare for a mediation:

- Talk with opposing counsel about settlement before the mediation.
- Prepare the client for how the mediator will be used.
- Prepare for resolution as victory.
- Prepare to collaborate more than advocate.
- Prepare to say "when."

**First, counsel should talk with each other about settlement before the mediation.**

At mediation, knowing what can be reasonably accomplished from the outset is the key to a

productive rather than frustrating mediation. Pre-mediation conversations enable the lawyers to give their clients realistic expectations about the numbers that will be exchanged as offers and demands. The conversations also should reveal at least some of the motivations each side has for their respective positions.

Maslanka writes that the other side's intentions should not be questioned. I am confident he means not to challenge the other side's good faith belief that they are right. To this extent, I agree. Mediation is not about convincing the other side you are right and they are wrong. Trying to do so will only result in frustration.

That is different, however, from helping the other side see the difficulty they will have in proving or defending their case. A well counseled party can recognize risk without believing they were wrong or treated lawfully. Pre-mediation conversation should make this task easier and more effective for both sides. When both sides recognize risk, the time is right for mediation and compromise.

So part of mediation should be helping the other side see their hurdles and letting them know that you know about those hurdles. This requires careful thinking about litigation and negotiation strategy before the mediation begins. The thinking is driven by the information acquired through pre-mediation conversations about settlement. Knowing what is motivating the other side's analysis of the controversy's value is essential to persuading the other side to change their analysis.

Furthermore, pre-mediation discussions may reveal that despite the mutual desire to settle, the parties are so far apart on the numbers that mediation will be successful only to the extent the other side has been better educated about the difficulties ahead. If the parties know that this is the most realistic outcome, then frustration with mediation will be reduced and later resolution without trial or judgment is more likely.

### **Second, identify and make sure the client understands why you are using a mediator.□**

The reasons for using a mediator can change during mediation, and the lawyer and client should be ready to recognize those changes. Recognizing the need to shift is more likely if a plan for using the mediator is in place before the mediation.

Mediators can effectively serve different purposes. Perhaps their least effective purpose is to serve as negotiator. Good lawyers are good negotiators. They don't usually need a third party to do that. But they may need a different voice to carry their message. Other roles that the mediator may serve are:

- A sounding board for arguments to be made to the judge or jury.
- A different set of ears to listen to the client gets tell their story.
- A more distant view of the case to evaluate its worth.
- A referee to insulate both sides from the other's animosity.
- A catalyst to assist when the negotiation dialogue has stalled.

These are some of the values a mediator can provide if the parties are ready to take advantage of them.

Clients are rarely frustrated by mediations that result in settlement. They are frustrated by mediations that don't. But leaving the mediator's office without an agreement does not mean the mediation failed. If clients know what purpose the mediator has served despite not reaching settlement, the client's frustration level will be reduced, and the mediation process will be more likely to help reach resolution later.

### **Third, get the client ready to value resolution as victory.**

Undoubtedly, the disparity between the amount the employee "demands" and the employer "offers" is the seed of the frustration Maslanka writes about. Too often a client enters mediation too focused on "winning." Winning is usually defined as getting the other side to pay or accept the amount desired before mediation. Parties too often arrive at the mediation with a goal that the mediator is going to convince the other side to see things the "right way."

A good mediator certainly will help clients see the weaknesses in their case that gives reason for resolution and negotiation, but if clients enter the mediation expecting to win their "argument", mediation is much more likely to fail and frustrate. The party's "argument" includes why the party is right about not only liability but also the settlement value of the case.

So I disagree with Maslanka's suggestion that a client should reveal their bottom line to the mediator early during the mediation. On one hand, the client and lawyer should know what outcome they want at the end of the mediation. On the other hand, they should participate in mediation with a mind open to changing their position. I am confident that mediators rarely have both sides reveal at the outset "bottom lines" that immediately meet the other side's desire. Instead, resolution results from changing the bottom lines.

Usually, the changes to the bottom lines will mean a shift to the middle. That happens when both sides' positions are softened by information causing a party to re-evaluate their risk and desire for certain resolution. But if the mediation begins with both parties' establishing their "bottom line", articulating the number early merely makes moving from it more difficult.

Of course, client and lawyer should have discussed a desired outcome before attending the mediation. That necessarily involves an assessment of what they expect the settlement number to be. A better approach than establishing a bottom line before mediation is to establish a desired settlement range that the client should be prepared to adjust based on facts revealed at the mediation. Again, the aim is to find a compromise point that will yield resolution. The aim is not necessarily to convince the other side that your bottom line is the right one.

### **Fourth, collaborate more than advocate.**

The lawyers and mediator should be working together for a common purpose at the mediation. Clients should be prepared for this before the mediation begins.

Preparing a client for this approach takes great confidence from the lawyer. Being an advocate in front of a client is much easier. The client is much happier when the lawyer is saying things the client likes to hear. But finding agreement requires both sides to acknowledge their shared points, and one side's weakness is often the other's strength. When the lawyer is acknowledging problems with a client's case in front of the client, the lawyer needs to have earned a lot of trust from the client beforehand to maintain a healthy attorney-client relationship.

Taking a collaborative approach toward mediation is even harder for the client. The party to an

employment dispute is often filled with emotional turmoil. The turmoil frequently manifests itself in venom aimed at the opposing party. As Maslanka correctly points out, this makes the mere entering into the mediator's office a moment filled with tension and insecurity. Clearly, these feelings also stand in the way of collaborating toward compromised resolution.

In most cases, the direct interaction between the employer and employee can be limited to avoid increasing the existing tensions. The lawyers should also be sensitive to how they can affect the emotions of their client and the opposing party. Throughout the mediation, the lawyers and the mediator should be a calming influence on the parties. Reducing tensions and increasing comfort is inevitably conducive to reaching resolution.

For this reason, I disagree with Maslanka's opinion that the lawyer should speak directly to the decision maker. At times, this should be done, but lawyers should use this method of communication sparingly and purposefully. An opposing counsel's direct address is too strong most of the time. It increases the opposing party's tensions, fears, and insecurities that are the enemy of resolution.

While Maslanka is clear that the lawyer should not use direct address to intimidate, the lawyer does not have enough control over this factor. As communication expert [Dr. Frank Luntz](#) would say, "It's not what you say, it's what people hear" that matters. As hard as a lawyer may try not to intimidate, the risk is too great.

### **Fifth, know when to say when.**

This is my variation on Maslanka's advice to "Liberate yourself with the power of 'no'". I have no disagreement with his advice about saying no. Eventually, a client should reach a point when energies must be focused not on compromise but on trial victory. But announcing this point as having been reached is a high risk proposition. The "no" point should only be established after most careful consideration.

Too much credibility is at stake. A lawyer needs to be credible when negotiating. If the "no" position is given up to continue negotiating, the lawyer and client will have trouble ever again finding a position of strength from which to negotiate. So "no" must mean "no."

That is exactly why a client should be so reluctant to say no at mediation. In most cases, mediation happens before the time comes to shift all energies to trial victory. The "no" point makes opening the door to further negotiation too hard.

But mediation does not always result in settlement immediately and does not have to end because one side or both sides said, "no." Instead, a client should understand before the mediation begins that the process may be only part of the settlement process. The client should be prepared to expect that a time might come when one or both of the parties may need more information than is available at mediation to change their position enough to reach settlement. If that point is reached, then the time has come to say "when."

"When" means 'when more information is available maybe we can reach agreement and compromise.' It also means the mediation session is no longer productive and needs to end until more information becomes available. Recognizing when and why that point has arrived is another way that a client can leave mediation without a settlement and without frustration.