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Understanding the mediation 'process'

By Kerry T. Ryan

The mediation is on for next week. Your attorney explains in detail the cost-benefit analysis you will want to consider to prepare for the mediation.

But did he explain the nuts and bolts of the mediation process itself? The process itself may determine whether the experience is a great success or a colossal waste of time.

Below are some practical considerations to keep in mind.

When the party on the other side (the one who has now cost you thousands upon thousands of dollars) walks into the room at the outset of mediation, should you stand up and shake his hand?

The answer is yes. Even at the start of a prize fight, the boxers shake hands. You do not show your "strength" by appearing rude. All you may do is convince everyone in the room that you are petty – not a good start to any endeavor.

How long will this mediation last? Most likely, it will last longer than you think. If it is scheduled from 9:00 a.m. until 5:00 p.m., you need to understand a critical fact: Virtually nothing happens until about 4:00 p.m.

Just when your patience is at an end, it is possible that movement will finally occur.



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Why this happens is a bit of a mystery, but it happens. Do not make your plane reservation for the end of the day. It will just increase the time pressure on you and most likely lead to you walking out of the mediation just when there is a chance that good things can happen.

Is there anything I can do to speed things along? No. You can push and you can shove. But, most likely all that will do is implicitly

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encourage your attorney to take an early stand (i.e., "we've had enough – if they don't take this offer my client has a plane to catch").

And that is usually when the mediation will end. Your attorney will have talked tough. You will have shown your "control" of the situation.

And you will still have this frustrating litigation to address. Instead, go into the process realizing that the real meat of the discussions may not occur until the receptionist has gone home and the vacuum cleaners are humming. That is when a determined mediator may finally break the logjam and the true negotiations begin.

Should we order lunch in and keep working? Absolutely. Mediations work best when everyone stays in close proximity. Your attorneys will be bargaining in the hallways,

in multiple conferences and even by the elevator. Keep everyone nearby.

Should I try to talk directly to the other side? You're probably thinking you are both business people at heart and maybe we can just work this out. At the beginning of the day, it's best not to do this, because you may easily send the wrong message. Let your attorney control the message. But at the end of the day, when everyone's jackets are off, the pretzels are stale, and people are starting to ask when the garage closes, if the mediator suggests that maybe a face-to-face sit down is in order with just you and the other side, go ahead.

Develop a plan with your attorney. Then keep your discussion with the other side simple. That's when you can shine.

It's late, but we have a deal. Can we go home now? Not yet. As painful as it may be, make sure the agreement is put in writing and everyone signs on. The crafting of the words on paper will crystallize your thinking and may raise issues you have overlooked.

Once you walk out of that room, everything changes. Deals fall apart. Don't let all your good work go to waste. Regardless of the hour, get something on paper (even if it is a one page, smudged, handwritten deal).

The more detailed the writing the better. Everyone is standing right there – a perfect time to negotiate any collateral issues, or run the risk of negotiating those same points over many months and thousands of dollars of legal fees. Get some coffee, and settle in and get it done.

It's been said that there is a "magic to the moment" with mediation. Unfortunately, it's usually when the coffee is bitter, shirts are wrinkled and empty pizza boxes are scattered about the room.