Effective Pre-Mediation Evaluation of the Commercial Case

by Charles R. Ledbetter and Julie McCurdy Williamson

“Before everything else, getting ready is the secret to success.” —Henry Ford

Let’s say you have a business dispute that you have decided—or a judge has directed—should be mediated. How do you prepare for such a mediation to improve the chances of a settlement? Your client is not happy about bearing the cost of mediation, but is even less happy about the continued cost of litigation. The client wants to stop the bleeding, but only at something close to what it feels is the “right price.”

Truth be told—there is never just one right price for a settlement. Successful negotiations always result in a range in which the parties can find agreement. From a mediator’s perspective, nothing allows the parties to arrive at that settlement range faster than candid and realistic case evaluations from all sides. At the same time, nothing causes more problems than unrealistic evaluations. Below are a dozen suggestions to help you prepare for the mediation with a good evaluation of the settlement range for your case.

1. Think of your client’s BATNA, WATNA, and Range of Reason. Determining settlement value is not an exact mathematical calculation. Nonetheless, in preparing your evaluation, it helps to think in terms of your client’s BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement). In other words, if the case goes to trial, what is the best and worst outcome your client can expect? The BATNA and WATNA should take into account not only the litigation risk, but the operational costs (for example, diversion of resources) and business exposure (for example, bad publicity) of proceeding to trial. Your analysis will also involve assigning relative weight to the likelihood of the best and worst outcomes. Working between those two scenarios will enable you to arrive at a Range of Reason—a range of numbers at which settlement makes sense.

2. Prepare your case as if preparing for trial. Although mediation is a less formal method of dispute resolution than a trial, do not approach the process casually. You need a good understanding of the strengths and weaknesses of all sides of the case. Corral your evidence—testimony and documents—and analyze the law with a view to how you plan to try the case.

If you don’t have the information you need to fully understand the case, consider postponing the mediation until you have completed the necessary discovery and legal research. Or, if you don’t have time for formal discovery, try to get the information informally. You can even use the mediator in pre-mediation discussions to try to get what you need from the other side before the mediation.

Coming to the mediation with the key evidence at your fingertips can help. For example, in a class action mediation, the plaintiffs’ lead attorney had all of the evidence on his laptop. He had studied the evidence and could pull up any of the key documents and deposition testimony in a matter of seconds. This ability to instantly show important evidence to the mediator and opposing counsel allowed him to recover millions of dollars more than he might have otherwise.

3. Study the contract. Most commercial disputes involve contractual documents. Contract terms can impact the ease or difficulty of proving liability and can limit or expand the damages recoverable. Surprisingly, counsel often have not carefully studied

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the relevant contract provisions. Make sure your case evaluation takes into account special contract terms and conditions, such as notice and waiver, warranties, limitation of liability, liquidated damages, limitation of damages, exhaustion of remedies, choice of law, choice of forum, arbitration, waiver of a jury, and right to recover attorney and expert witness fees. Some terms, such as fee- and cost-shifting provisions, can really hurt your client if the client litigates and loses. The risk of your client having to pay not only its own fees and costs but those of the other side should not be ignored.

4. **Objectively assess the witnesses and evidence.** After you have organized the evidence, take a step back and consider the case from the perspective of a neutral decision maker hearing the facts for the first time. Don't look at just the positive aspects of your case; take into account the strengths of the other side's case and the weaknesses of your own. If you are on the defense side and you know the plaintiff makes a great witness, include that in your evaluation. If your client did stupid things, address those, as well. Be sure to deal with the adverse aspects of your case in your mediation statement. A statement that addresses both the good and the bad parts of your case builds credibility with the mediator and, more important, gives you a better evaluation for your client to consider before rolling the dice at trial.

5. **Analyze recoverable damages.** A number of factors can limit or expand recoverable damages. For example, the contract itself may provide for liquidated damages and/or exclude the right to recover lost profits and other consequential damages. Lack of evidence may make damages difficult to quantify. The claims alleged, such as statutory violations, fraud, theft of trade secrets, and civil conspiracy, may also be important if they allow for recovery of attorney fees or punitive or treble damages. Such claims may also present different risk factors, such as joint and several liability among the wrongdoers and admissibility of evidence from co-conspirators.

6. **Use jury verdict research.** The locale where your court case is pending can have a huge impact on its value. Many jurisdictions have reasonably priced jury verdict reporter services, such as *Jury Verdict Reporter of Colorado*, where you can obtain similar case verdicts by venue. This information can lend credibility to your evaluation or discredit that of the other side. Of course, every case is different, but sometimes this information can be useful to reinforce the risk of going to trial in a given jurisdiction.

7. **Consult experts if necessary.** Reliable case valuation may require information from one or more experts. For example, for an environmental case, you may need expert input on such issues as contamination, causation of injuries, and costs of remediation. For a contract dispute, you may require an expert to calculate lost profits, appraise a property, or value a business. While damages in some cases are easily calculable, an expert can often provide assurance that you have captured all available damages and establish that your damages are more than “pie in the sky.” If expert disclosures have not occurred before the mediation, you can nonetheless share the expert’s analysis with the mediator and decide whether to give the mediator permission to share it with the other side. If the case is
expert-driven, consider having the expert attend the mediation in person or via Skype to make key points or counter opposing expert views. Experts can also help create summary charts and other demonstrative exhibits to convey information persuasively to the mediator and the other side.

8. Consider insurance and other resources. The collectability of a potential judgment is always important in setting settlement value. The availability of insurance and applicable policy limits may be key. The amount of a defendant’s own assets also may be significant; don’t assume the financial stability of the opposing party. Legitimately obtaining financial information on most companies is relatively easy in our information society. Services or programs such as Westlaw’s Investigator’s Tool or TLO may provide useful information beyond the credit bureau reports. In addition, consider whether the defendant has other sources of funds, such as family members, off-shore trusts, or affiliated entities. These funds may be available to pay an agreed-upon settlement, but may be difficult or impossible for a judgment creditor to reach. If the financial stability of your client and/or a possible bankruptcy filing could be a factor in settlement, you may want to be prepared to provide certified financials to the mediation to prove your point.

9. Think about the decision makers at trial. A complex business dispute pending before an arbitrator with subject matter expertise may well be valued differently than one to be heard by a jury or by a judge with little commercial experience. The particular judge assigned to the case may also impact the settlement value, so gathering information about the judge’s background and propensities can be useful.

The forum can also impact the cost of continued litigation. If you are in arbitration, the case may or may not be cheaper to prosecute or defend. Also, if trial is in an out-of-state venue, you will need to factor in travel and lodging costs and the cost of hiring local counsel. Include these considerations in your mediation thinking and litigation budget.

10. Consider the impact of critical motions. Frequently, resolution of one or more pending motions can significantly change the case evaluation. In fact, some litigators file motions for summary judgment or motions in limine shortly before the mediation to gain leverage. Consider whether you want to know the ruling on those motions before the mediation. In some cases, uncertainty as to how the court or arbitrator will rule makes settlement more likely. However, if the parties are not willing to factor the odds of winning or losing the motions into the evaluation calculus, you may need to postpone mediation until you know the outcome. If you think pending motions provide a significant bargaining chip, be prepared to argue the law and have copies of key cases for the other side.

11. Calculate the cost of continued litigation. Litigation budgets, although torturous to prepare, are useful tools to inform your client of the potential financial cost of not settling. Many cases settle partly or wholly because the cost to pursue or defend them is just too high. Spend the time to prepare a thoughtful and detailed budget (with appropriate caveats for unexpected events) of what it will cost to try the case, including post-trial motions. Knowing this information will not only help the mediation process but may also enhance your client relationship. No client likes to be hit with unexpected legal expenses as trial approaches.

12. Understand the drivers toward and the obstacles to settlement. Figure out what other interests or concerns are driving the parties to settle or, alternatively, are standing in the way of settlement. For example, if the defendant is subject to multiple lawsuits, would settlement enable it to avoid the precedential value of an adverse judgment? For example, is settlement desirable because an adverse finding at trial on a fraud claim would endanger the defendant’s ability to enter into government contracts or obtain financing? On the other hand, does the defendant face professional consequences if it settles (for example, required reporting) that would be avoided if the defendant won at trial?

As part of your analysis, consider the identity of the person(s) who control settlement for each side. For example, a corporate executive who implemented the business practice that caused the lawsuit may be concerned about losing face or status within the corporation if settlement is seen as admitting wrongdoing. Similarly, the plaintiff may have such anger toward the defendant that it is emotionally hard for the plaintiff to accept any settlement other than complete capitulation. All of these factors, while not measurable mathematically, can impact the reasonable settlement range of a given case.

Conclusion

Once you have done all this work, don’t forget to share your assessment of the case with the client before the mediation. Give your client the opportunity to carefully read your pre-mediation statement before you send it to the mediator. If your pre-mediation evaluation is significantly different from one previously given to the client, explain the differences. The mediation itself is not the time to surprise the client with unexpected news. If the client doubts your assessment, ask the mediator to address, and hopefully support, the new evaluation. At the same time, emphasize to the client that your valuation range is not set in stone and that some flexibility will likely be needed to get a deal done. As the mediation progresses, you and your client will need to continually reassess the client’s position, particularly if it becomes apparent that some additional movement will put an end to the dispute.

Whatever your evaluation of the case, try to be compassionate and considerate of those on the other side. In a recent products liability case, in-house counsel for a major automobile manufacturer started the mediation by asking to meet with the plaintiffs, who had been badly burned in an accident. He told them how sorry he was they had been injured so terribly. He said that the only thing that his company could offer at this point was money and he wanted to explain that before the negotiations began. This simple gesture of compassion and empathy allowed his company to settle the case that day for a reasonable sum, while other defendants did not. Expressing genuine understanding of and sympathy for the other side’s situation can go a long way.

You can now head into your mediation secure in the knowledge that you are thoroughly prepared. Hope that the other side has done its homework, as well. Let the discussions begin.