Preparation Is the Key to a Rewarding and Successful Mediation

By Theo Cheng

Mediation is a confidential process in which the parties to a dispute engage an impartial, disinterested third-party to facilitate discussion among the parties and assist them in arriving at an informed and mutually consensual resolution of the dispute. Oftentimes, attorneys and their clients approach the mediation process solely as a calendaring exercise for the main event, i.e., scheduling a mutually convenient time and date for the mediation session. In doing so, they almost always never provide for much time between the initial contact with the mediator and the desired mediation session. However, a meaningful mediation process is so much more than that, and it can be both rewarding and successful if attorneys and clients both expend the time and energy to prepare for the various stages that take place throughout that process and the clients' expectations are managed in advance. The more they both know about what will likely happen during a mediation process, the higher the likelihood that a resolution of some kind can be achieved and/or they will reap the other benefits of undertaking a mediation process. This article highlights some things to consider during that preparation.

First, the client needs to understand the nature of a mediation process and, especially, how it differs from litigation. Axiomatically, the parties who are most directly affected by a dispute are, given the right circumstances, the ones who are best able to resolve it. Thus, because the normatively best resolution is likely to flow directly from the parties themselves, mediation is based upon the principle of party self-determination. "Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[1] To assist in that endeavor, the nature and design of a mediation process is completely flexible and can be tailored to meet the specific needs of the parties and their dispute. In some cases, having the parties together in a joint session at the beginning of a mediation can be a fruitful way to start a dialogue and, perhaps, the healing process; in other cases, keeping the parties separate and apart from each other is more conducive to making progress toward a productive and meaningful resolution. These and other design issues should be carefully considered by both the attorney and the client, as well as discussed with the other participants, along with the mediator. In most instances, a one-size-fits-all approach to mediation would ignore pertinent characteristics of the parties and the dispute, leading to mediation being treated in a cookie-cutter fashion that deprives the parties of the full benefits of that process. Specifically, doing so eliminates one of the fundamental attributes of a mediation process—the ability for the participants to customize it for the particular dispute in question.

By contrast, litigation presents several limitations, including the lack of real flexibility in designing a mechanism for resolution tailored to the dispute in question; the additional expense (in time and legal fees) of appearing before a decision maker with possibly little to no expertise in the subject matter of the dispute; the inability to maintain true confidentiality because of the public nature of the proceedings; and, perhaps most poignantly, the frustration of having no control over the timing of the process and when relief can be afforded. Unlike litigation, mediation is a non-adjudicative process. There is no judge or other decision maker who will determine the merits of the dispute. Rather, a mediator selected jointly by the parties conducts the proceedings with an eye towards trying to improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them towards a negotiated settlement or other resolution of their own making.

Additionally, while litigation generally looks to past events to find fault and impose appropriate relief, mediation focuses on the future to determine how the parties can best resolve the pending dispute and move on. Moreover, usually by statute, rule, or case law, mediation is a confidential process, which generally means that any communications made during the mediation cannot be used or disclosed outside of the mediation. It also means that *ex parte* communications with the mediator are kept confidential from the other participants in the process, absent consent from the party with whom the mediator communicated. Confidentiality is another bedrock principle of mediation because it helps foster open, honest, and candid communications with the mediator, if not also with the other participants.[2]

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Second, the attorney and the client both need to be prepared for a change in mindset from an adversarial posture to one that is more cooperative and collaborative. Mediation is a completely different mechanism from litigation for resolving disputes. In litigation, a party advocates for positions while simultaneously trying to undermine the other party's positions. By contrast, mediation is prospective in nature and tries to help put parties on a path to a resolution for mutual benefit. Moreover, parties to a dispute oftentimes are unable to engage in negotiations towards a resolution because the dispute has triggered the emotional, sometimes irrational part of the brain (the amygdala) and is interfering with the thinking, rational decision-making part of the brain (the neocortex). For a resolution to be achieved, human brains need to shift and change from the former to the latter. Unless and until the conflict between those different parts of the brain is resolved, a complete resolution of the dispute is not a likely outcome of a mediation.

Mediation can be a process that helps parties undergo that shift and change, and one of the skills of a mediator is to help parties do just that. In the context of a mediation, an expression of concern for the injury or pain suffered by the other party need not be accompanied by any admission of fault or agreement with the other party's positions. That is, there is nothing inconsistent with a party holding a strong conviction about its positions, while also recognizing that continued litigation typically means spending more money, more time, and more emotional capital to achieve an outcome over which the party has increasingly less and less control.[3] The change of mindset from adversarial to cooperation and collaboration is a hallmark of the mediation process.

Third, both the attorney and the client need to understand the importance of finding the right mediator for the dispute in question. Selecting the appropriate mediator is an important aspect of the process that is oftentimes critical to maximizing the likelihood that a resolution can be achieved. The parties could opt to select a mediator who is well-versed in mediation process skills and/or someone who is an "expert" familiar with the subject matter of the dispute, the industry or background business norms in which the dispute arose, or the legal framework governing the dispute itself. Thus, not every mediator is best suited for every conceivable dispute. Put differently, as is the case in the real estate field, there's a buyer for every property, but not every buyer is the right buyer for any particular property.

As currently practiced in the mediation marketplace, selecting a mediator is largely based upon individual profile and reputation. Attorneys and parties typically use a combination of informal and formal due diligence methods, including soliciting feedback from colleagues (e.g., word of mouth, underground information, e-mails sent around the firm, etc.); soliciting feedback from other mediators; conducting social media research (e.g., LinkedIn, Twitter, Facebook, Instagram, etc.); and consulting other publicly available information (e.g., generally researching the internet, conducting Westlaw/LEXIS searches, retrieving publicly available awards, etc.). Two other methods worth noting are (1) sending out questionnaires or e-mail queries to potential mediators and (2) interviewing potential mediators. Particularly because *ex parte* contact and communications with mediators are generally permissible (unlike the case with an adjudicator like a judge or an arbitrator), it is surprising that these methods are not used more often. Indeed, the personality of the mediator and his or her ability to build rapport and trust with the participants are important attributes that may well determine the course of the mediation process. Thus, it seems a missed opportunity that these two methods are not more widely used.

The purpose of employing the foregoing due diligence methods is designed to ascertain the reputation, knowledge, expertise, experience, effectiveness, and suitability of particular mediators to the dispute in question. The experience and competency of the mediator's process skills is certainly one key focus of this inquiry, and, depending upon the nature of the dispute in question, industry, business, legal, or subject matter expertise may also be important.[4] Thus, to the extent that attorneys and parties are having difficulties either identifying an appropriate mediator and/or are bereft of tangible, helpful information about potential mediators, they should undertake a robust due diligence process, consulting as wide a variety of sources of information as time, money, and energy will permit.[5]

Fourth, attorneys and their clients need to spend the time and effort to provide both the other participants and the mediator with sufficient information not only about the dispute, but also about the factors that may affect how a resolution could be achieved. Oftentimes, the parties will agree to undergo a mediation process without enough information in hand about each other's respective positions and interests. Conversely, attorneys and parties often resist mediation on the theory that holding a session at this time would be premature because they are not sufficiently informed (or, said differently, have not conducted enough discovery) to be able to make rational decisions regarding a resolution. But one of the roles of a mediator that is often overlooked is to assist the attorneys in structuring a limited, informal exchange of information and/or documents that will help each party better understand the parameters of the dispute, what positions each party is taking and why, and help each party undertake a more serious, balanced, and informed evaluation of both the merits of the dispute and an appropriate valuation for resolution purposes. Doing so will ultimately allow the parties to better appreciate not only their own contentions, but the contentions being advanced by the other participants.

Most mediators will also ask the parties to submit additional information in advance of the mediation session, either on an *ex parte* basis and/or exchanged with each other. This is a tremendous advocacy opportunity to address the client's perspectives as to both liability and damages; the client's interests and concerns regarding the dispute; the client's reasonable proposals for a resolution, including any non-monetary proposals; the status of any prior settlement discussions; and any other information that might be relevant for the mediator and/or the other participants to know while preparing for the mediation session. The submission can also address some fundamental questions, such as what is at the core of the dispute; what is preventing the dispute from resolving; what potential roadblocks, barriers, or impasses to a resolution might exist; and what would need to happen to resolve the dispute, such as any specific conditions (i.e., "must-haves") that need to be a part of any resolution.

The pre-mediation submission is also an opportunity to alert the mediator and/or the other participants about any cultural issues that could impair the mediator's ability to develop a rapport with the participants, impede the receipt/flow of communications and information during the mediation, or otherwise interfere with the mediator's attempt to create an environment conducive to cooperation and collaboration. To the extent that the submission is shared with the other participants (even if only in a redacted form), it will begin the process of educating them about the client's positions, interests, and needs and, in the process, help move the dialogue forward. The more the other participants understand and appreciate the strengths of the case (as perceived by the attorney and the client), as well as the interests and needs of the client, the more likely that progress can be made at the mediation session itself. Taking full and serious advantage of the pre-mediation submission is an opportunity not to be missed.

For many mediators, one of their practices is to hold a pre-mediation call with the participants, or at least with the attorneys. During that call, certain housekeeping matters will invariably be discussed, such as who will be attending the mediation session; the date, time, and place of the mediation session; and how the mediation session will be conducted (opening remarks, joint sessions, etc.). The topics of informally exchanging information and/or documents and submitting pre-mediation briefs or other materials before the actual mediation session are ones that are also likely to be raised by the mediator in that call. The participants should be prepared to discuss what information and documents they think would be helpful to exchange in order to have a more productive session and set a schedule for that exchange. Although the mediator cannot compel disclosures from any participant, he or she can facilitate that exchange by helping the parties reach agreements on its scope and set dates, as well as be available should the parties need assistance with that portion of the mediation process.

Fifth, the client needs to be prepared to participate in the mediation process itself. Unlike meet-and-confer conferences with opposing counsel or an oral argument or trial in a courtroom, a client should not sit idly by at a mediation session while the attorney handles the proceedings. Mediation requires a client to be actively engaged in the process and participate by helping the mediator (if not also the other participants) better understand what interests, concerns, needs, feelings, and motivations are underlying the adversarial positions being taken in the dispute. Clients (and/or their representatives at the mediation) should be familiar with the background facts of the dispute, be able to answer questions from the mediator (who will typically be gathering and assimilating the basic facts during the early portions of the mediation session), and be involved in re-evaluating positions as new information comes to light during the mediation. Active participation by the client is critical to the success of a mediation.

Sixth, all the participants in a mediation should take advantage of the flexibility that mediation affords to exercise the opportunity to be creative and truly "think outside of the box." Much too often, attorneys and their clients come to mediations focused on a resolution based solely upon monetary terms. They fail to recognize that mediations—which are, at their core, a type of facilitated negotiation—can be at its most efficacious when the concepts of integrative negotiation (or principled bargaining) are employed. Integrative negotiation techniques allow the parties to uncover and identify the real underlying interests and needs behind the positions the parties are espousing; determine how to articulate such interests and needs to each other; and creatively search for and develop options for mutual gain (i.e., "expand the pie") that integrate those various interests and needs.[6] By focusing on the problem at hand, rather than the people who brought the dispute forward, mediation affords the participants the opportunity to explore any number of potential solutions that may resolve the dispute. And because these solutions will eventually be embodied by a voluntary, consensual, and informed agreement between the parties, they can accomplish objectives that an adjudication cannot because a court or arbitrator is usually constrained by the legal framework to provide only certain kinds of relief. Creative and innovative thinking are highly encouraged in a mediation.

Finally, and perhaps most important, attorneys and clients should be prepared to spend enough time to allow the mediation process to unfold and, thereby, reap its benefits. Mediation is a marathon, not a sprint, and progress towards a resolution or other desired outcome can only be made if the participants are willing to engage with the mediator, if not with each other, and undergo the steps necessary in an integrative bargaining process. Those steps include recognizing how and when options for mutual gain can transform into the foundation for a resolution, as well as acknowledging when the parties are at an impasse, at least at this time, and leaving open the possibility of reconvening and resuming the process at a

different time. A mediator needs to set the appropriate tone and establish a rapport with the participants, giving them the opportunity to be heard. In turn, doing so will allow the participants to truly hear any observations that the mediator offers about the dispute, the parties' respective positions, and the proposals for resolution being considered. Moreover, although a mediator may be asked to recommend possible solutions, a mediator is not authorized to impose a resolution, but, rather, provides an impartial perspective on the dispute to help the parties satisfy their best interests while uncovering areas of mutual gain. In that respect, mediation can be particularly helpful in those situations where the parties either are not effectively negotiating a resolution on their own or have arrived at an impasse in their dialogue. Not only does all of this take some time to develop, but also the shift in the brain from the emotional/irrational part to the thinking/rational decision-making part takes some time to accomplish. The participants in a mediation need to be realistic about their expectations on how the mediation process will unfold in order for it to be as rewarding and successful as possible.

Attorneys oftentimes treat mediations as just another extension of the litigation process, where their finely honed legal skills—sharpened for the inevitable adversarial battles inherent in discovery and trial—will simply be put to good use before the mediator. But a mediator is not the adjudicator of the dispute, and mediation is an entirely different process altogether. As much as preparing for a motion argument, an evidentiary hearing, or a trial requires much advanced preparation, preparing for a mediation also requires a different set of skills, a different mindset, and, as in all effective advocacy, proper representation and solid preparation during all phases of the process, both before and during the mediation session. To paraphrase a prominent litigator, the key to success in litigation is preparation, preparation, and more preparation. That mantra applies equally in the mediation context. It is only through dedicated preparation by both the attorney and the client (as well as the mediator) that a mediation process can be rewarding and successful for the participants.

Endnotes

1. Standard I.A., Model Standards of Conduct for Mediators (2005) ("Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.").
2. *See generally id.*, Standard V. (Confidentiality).
3. *See* Theodore K. Cheng, *Managing Disputes Across the Resolution Process Spectrum*, Diversity & The Bar (Summer 2017), at 10, available at http://www.diversityandthebardigital.com/datb/summer_2017?pg=1#pg1.
4. *See generally* Theodore K. Cheng, *Providing for Neutrals with Industry, Legal, and Business Expertise*, NYSBA Entertainment, Arts & Sports L. J., Vol. 29, No. 3, at 97 (Fall/Winter 2018).
5. For example, the International Mediation Institute (https://www.imimediation.org/) maintains feedback evaluations on mediators it certifies that are available to the public on its website. Several initiatives have also been started to help fill the "information gap" that exists with respect to identifying potentially suitable mediators and arbitrators, including Arbitrator Intelligence (https://www.arbitratorintelligence.org/), a non-profit organization founded at Penn State Law that is helping to develop resources to promote transparency, accountability, and diversity in the arbitrator selection process; Dispute Resolution Data (http://www.disputeresolutiondata.com/), an online data subscription service providing access to closed international arbitration and mediation process information; and the GAR Arbitrator Research Tool (https://globalarbitrationreview.com/arbitrator-research-tool), a database of information on arbitrators maintained by Global Arbitration Review. Additionally, reputable sources listing mediators can be consulted, such as the American Arbitration Association's Mediation.org website and the National Academy of Distinguished Neutrals (www.nadn.org).
6. *See generally* Roger Fisher, William Ury, and Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In (Penguin Books 3d ed. 2011).