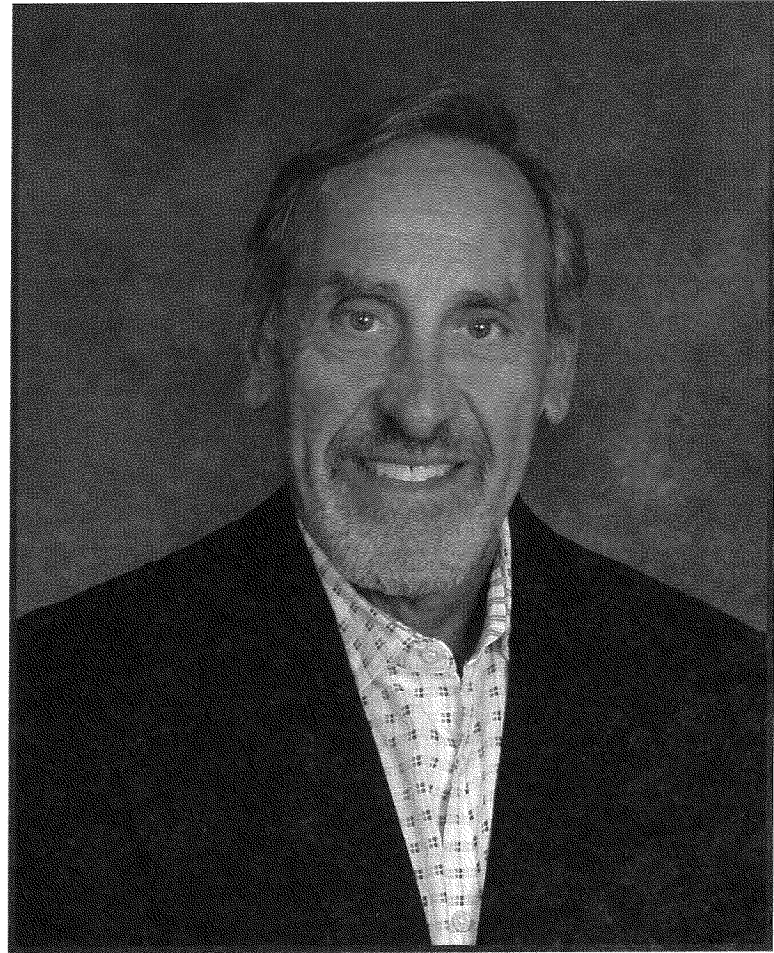
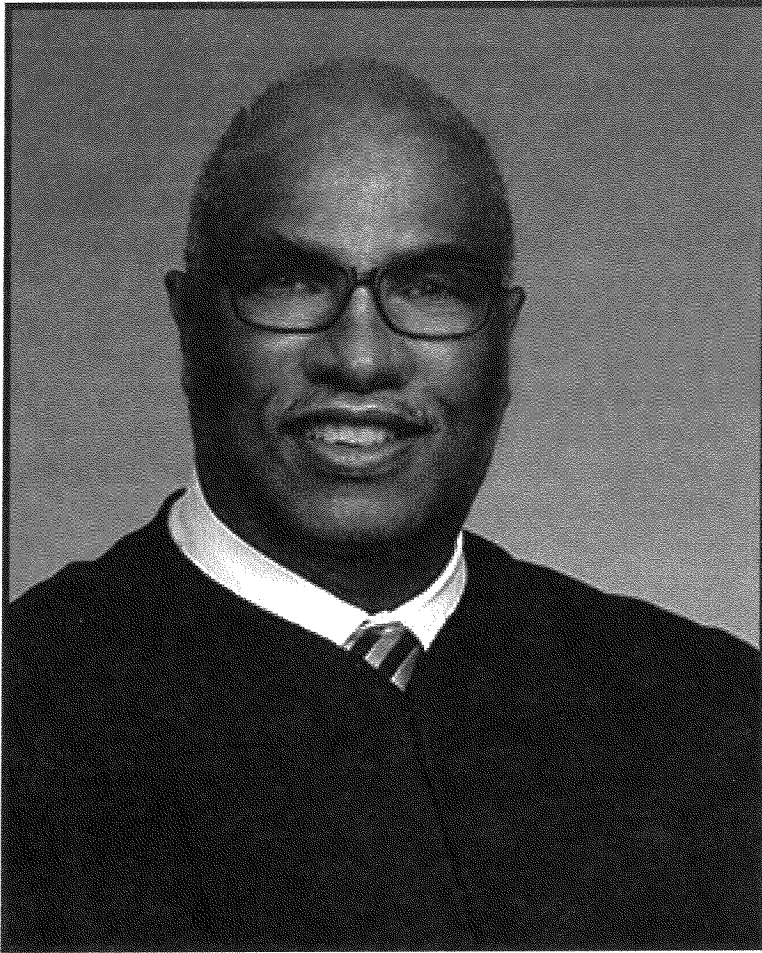


Be Prepared: Effective Advocacy in Mediation

by Hon. Michael Jamison and Mitch Margo



“I’ll see you in court,” still resonates on television dramas, but litigation now almost always includes a stop at mediation. Contracts often require it and many courts now “recommend” it, by which the judge means: do it. Lawyers facing a mediation will fare much better for their clients by heeding these two words: be prepared.

There is nothing a mediator appreciates more than a prepared advocate. In getting your case ready for mediation in 2021, think of these four categories.

1) Prepare yourself; 2) Prepare your client; 3) Prepare the mediator; and 4) Prepare for online mediations.

Prepare Yourself

Too many advocates approach mediation day as a day of personal learning. Some lawyers think that submitting no pre-mediation brief, or one that cuts and pastes a few paragraphs from the Petition or Answer, is sufficient. The mediation should be viewed as what could be the most important, and last, day of the litigation.

Just as writing jury instructions before a trial helps lawyers synthesize the essence of what needs to be proven at trial, so too can preparing a succinct,

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confidential pre-mediation brief enlighten a lawyer about the strengths and weaknesses of a case. Even the most seasoned but unprepared lawyer is obvious, and not fooling the mediator. The unprepared lawyer has just made the mediator's job more difficult, the day longer and settlement less likely. Mediators do not like that. Mediators, like judges, are people, too.

A prepared advocate knows the case and appreciates the forum. This is mediation, not a time for aggressive lawyer pontification. Beginning your opening statement by staring at the defendants on the other side of the table and proclaiming, "the three of you are thieves," isn't going to help your client walk out of the room with an adequate settlement and may just end the mediation right then and there.

Instead, telling a calm, generally short story that exudes confidence in your claims, recognizes the costs and uncertainties of litigation and welcomes the participation in a good faith effort to resolve the case "today" will yield far better results than overstatement, insults and braggadocio.

Finally, arrive at the mediation with an open mind and flexibility, but some idea, some range, of what your client will be willing to take, or pay, to resolve the dispute. This often involves mathematical computations more complicated than division by thirds, and a general idea of the future costs and expenses if the case does not settle. It also involves prior discussions with your client.

Prepare your Client

All lawyers know that clients come in all shapes and sizes, from unsophisticated minimum wage earners, to CEOs with seven-figure incomes, to insurance company adjusters in a budget cycle. What they all have in common, however, is each needs to be prepared for the mediation before walking in.

In most cases, the mediator will begin the mediation with a set of ground rules and a mediation agreement, but there is nothing quite as frustrating to the mediator as a lawyer's client, who looks at the mediator with a blank stare and, in response to the "release language" in the settlement agreement, says, "No way. Nobody told me that."

Meeting with your client in advance to walk through the anticipated mediation logistics will pay dividends in the mediation. If lawyer and client can arrive together that's always a plus. Having a client sitting alone in an office waiting 45 minutes for her lawyer (who she has never met) is a recipe for disaster in mediation. But it happens.

Talk with your client (and confirm with the mediator) whether your client is going to address the other side in the opening session. There are times when some heartfelt words from a personal injury victim can be helpful and persuasive. Other times it is best for the client to remain silent. A well-prepared advocate who knows the client will know the difference. Keep in mind that although this might be your third mediation this week, it is probably the first of your client's lifetime and is likely to be stressful for them. Warn your client that you might hear some nasty comments, some misconceptions and some outright lies. Don't lose your cool.

Managing a client's expectations in a mediation may be the most important job of an effective advocate in getting to settlement. In preparing your client you might ask yourself: Is the case more emotion than cash? How important is an apology? Or is this case all about moving money from A to B?

Clients going into mediations should understand the basics. A mediation is a process by which an impartial intermediary helps the parties resolve their differences. It is surprising to mediators how many clients come into mediation not knowing the difference between mediation and arbitration. Tell your client that the mediator is not going to select a winner and a loser. Tell your client that a successful mediation leads to a settlement, and a settlement means that everybody gets something. Otherwise, why settle?

The Plaintiff-client needs to know that to resolve the case in mediation, the client is not going to get all the money they believe they deserve. In exchange for taking less, the Plaintiff-client is eliminating the risk of a loss, in many cases putting an end to mounting legal fees and often is freed from the stress that comes with litigation.

The Defendant-client needs to know that they will pay some money they do not believe they owe. In

exchange they will eliminate the risk of a complete loss, including sometimes the payment of legal fees for both sides, and the client can get on with their life, or with running a company, or get the case off the insurance company books.

Advocate attorneys should also prepare their clients for a long, often boring day. The mediator is the only person working all the time in a mediation. When the mediator is meeting with the other side, hours can go by sitting in your conference room waiting for the next demand or offer or lunch. Advise your clients to bring a book, a crossword puzzle or some diversion to make the day go more quickly. Chances are if your case is going to settle, it will not be until late in the afternoon or early evening, when the shuttle diplomacy ends with the material terms of a settlement agreement, which the attorneys will either finalize right then or after the mediation is over.

Prepare the Mediator

For advocates, preparing the mediator starts with finding the mediator who is best suited for your case. Like most states, Missouri has no formal licensing or credentialing practice. As a result, a mediator's training does not mean that the trainee is a "certified mediator," but rather that they meet the requirements to apply to be listed as a mediator. Most mediators have a mediation genre in which they are most comfortable, be it commercial disputes or family law. Find one that fits your case.

Find a mediator who is a good listener. Confidence in the mediator's ability to hear and synthesize the issues goes a long way when you are acting in the capacity of "translator" for your client. Your client must believe and know that the mediator is listening to your side of the story. To successfully advocate for settlement, the parties have to believe the mediator "gets it," and although they are not advocating on behalf of any particular party, they should know that the mediator is advocating for a fair resolution.

Prepare the mediator by making sure the mediator understands what statements to keep in confidence and what may be disclosed at the appropriate moment. The advocate's Pre-Mediation Brief should identify the critical issues in the controversy and allow the mediator to properly frame or reframe the issue(s). This is crucial in order to get the parties to view the problem in a different light, putting them in a problem-solving mindset rather than one of conflict. By actively listening, acknowledging,

and paraphrasing each party's issues, the mediator can determine the wants, needs and what is at stake for the parties. This often allows the mediator to offer different views without provocation and may serve as one of the silent movers that motivates you and your client to consider other points of view.

The well-prepared advocate will anticipate the issues to be presented by the other side and alert the mediator about any flaws in those opinions. By preparing the mediator to make your points, you can avoid the phenomenon of reactive devaluation, where a proposal is less desirable simply because it is proposed by the opposing party. If the mediator makes your suggestion, the other side will react to it better. But this only happens if you have prepared your mediator. The mediator is focused on common interest, rather than positions, and trying to create options for mutual gain.

A well-prepared advocate will often arrive with a draft settlement agreement in hand or available on a laptop computer. Once a settlement has been reached, presenting a first draft to the mediator is greatly appreciated and often creates the advantage of beginning the settlement part of the mediation with familiar language.

Prepare for Online Mediation

The COVID-19 crisis has presented many challenges to alternative dispute resolution. There are obvious problems of safety, reluctance by the parties for face-to-face meetings, and the fact that the use of personal protective equipment does not appear to work effectively for ADR and has made traditional mediation impractical and unsafe.

To solve these problems, the legal community has turned to other platforms for ADR, like ZOOM, Cisco WebEx, Skype, Google Meet, GoToMeeting, Adobe Connect and even FaceTime, to name a few. These platforms represent an alternative, if you will, to traditional ADR. Not only do they address the problems presented by the pandemic, they may be the future of ADR.

Improvements in technology and the demands imposed by the pandemic make the use of virtual ADR, or Online Dispute Resolution (ODR), a prime example of the adage that necessity is the mother of invention. The only question is whether the ADR advocate is prepared for the technology involved in ODR.

There are certain “musts” for a successful ODR. Some are provided by the mediator, like consistent high-quality internet service and knowledgeable personnel. Some of the burden of a successful ODR falls on the advocate. Becoming fluent with ODR in advance is prudent to allow the parties to engage comfortably with ODR.

Although we all look forward to returning to in-person ADR when post-pandemic life returns to “normal,” ODR will continue to be used post-pandemic and will be a valuable supplement to face-to-face ADR.

There are ample reasons to use ODR now and into the future. With the huge backlog of cases and jury trials being put off for the time being, parties have an incentive to settle and are often willing to explore ODR. Accordingly, for the lawyer-advocate, there are pros and cons which should be considered when exploring the use of ODR.

Pros

ODR is Time Saving. The mediator and parties save travel time and the attorney and client can work from the attorney’s office or home, eliminating any downtime that might occur during an in-person ADR. The ODR “host” can place parties in virtual break-out rooms for party caucusing. Hours and days of the week are no longer a deterrent. If the parties are willing, the matter may be conducted outside of traditional weekday business hours; even weekends are an option.

ODR Reduces Expenses. Because an ODR allows parties to participate from anywhere, there is little or no expense for travel. Moreover, the parties are not limited to local mediators. Because the mediator can operate from their own home base, the parties no longer incur the travel expense of out-of-town neutrals. However, although expense and notoriety are important considerations, the parties should not lose sight of the advantages of local mediators who can provide keen insight with their experiences on possible outcomes should the matter have to be litigated.

Cons

Control of the ODR Environment. Discussion with the parties should be held in advance to prevent any unauthorized persons or party’s untimely entry. This requires strict policing. Recording the ODR should be completely prohibited. All platforms provide instructions on how to avoid unauthorized entry and hacking.

Mediators and advocates should become familiar with these practices, including requiring and protecting passwords, setting up waiting rooms, managing participants, turning off video and muting participants upon entry. Maintaining a stable internet connection is imperative and a separate home office space free of distractions is invaluable for the ODR practitioner working from home.

Final Thoughts

A successful ODR means:

Learning the technology.

Taking charge of the process.

Maintaining a fair and respectful proceeding.

Practice and preparation.

The benefits of ODR during a pandemic are abundantly clear. Online Dispute Resolution will be an equally valuable tool whether done within or without a pandemic. ♣

Online Resources:

What to Look for In A Basic Mediation Training
<https://www.mediate.com/articles/levinD1.cfm>

The Candid Guide to Getting Great Mediation Training
<https://tammylenski.com/mediation-training-guide/>

Become a Mediator in Missouri
<https://www.momediators.org/becomeamediator.html>

Top 5 Ways COVID Is Reshaping Dispute Resolution
<https://www.lexology.com/library/detail.aspx?g=422ce65d-13d1-423c-a731-5970ea1ad341>

ODR in the Era of COVID-19
https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/odr/

The Future of ADR, Post-COVID: Personal Musings from a Neutral
<https://www.jdsupra.com/legalnews/the-future-of-adr-post-covid-personal-89958/>

Three Tips for International Online Dispute Resolution in the Age of COVID-19
https://www.americanbar.org/groups/business_law/publications/blt/2020/10/intl-odr/