

By: **Mark Travis**
Travis ADR Services, LLC



THE TOP TEN THINGS YOU NEED TO ASK YOURSELF BEFORE GOING TO MEDIATION

As the use of mediation continues to grow, it's becoming considered just another stage in the life of a lawsuit. However, taking just any case to mediation without careful screening can be a recipe for disaster. Just as there are no "slam dunks" in litigation, there are no certainties that every case can be mediated, and even in those that can ultimately be mediated successfully, the timing of the mediation is often critical.

Accordingly, counsel would be well-advised to ask the right questions prior to mediation in an effort to determine whether the case is generally appropriate for mediation, and if so, whether the timing is optimum. The following is this mediator's "Top Ten List" of those screening questions.

- 1. Is settlement of this case likely at some point in the life of this lawsuit?** Attorneys acknowledge that most lawsuits do indeed settle at some point. However, there is the rare case where one or both of the attorneys assert that settlement is simply not possible. Perhaps it's more a question of timing, but if that is indeed the position of one or both of the attorneys, the chance of settlement is difficult indeed. While a negative response shouldn't totally preclude going forward with mediation, a positive response to this question is a good sign for proceeding with the mediation.
- 2. Is there some possibility for a continuance of the relationship between the parties?** While it may take some creativity to imagine a continuing relationship after a lawsuit has been filed, that potential exists more often than many advocates would readily accept. Whether it is a contract for new business in a commercial case or continued employment in an employment case, the possibility of a continuing relationship is definitely a positive sign for mediation.
- 3. Have you conducted an objective analysis of the case, or is mediation just part of an overall litigation strategy?** The attorney should have conducted a full investigation of the facts; be familiar with controlling law and verdicts; candidly assess the strengths and weaknesses of the case; understand the time frames necessary for final disposition; have an accurate estimate of the range of damages, fees, and costs; and have determined a best case/worst case scenario if mediation is unsuccessful. Going to mediation without going through this process is probably a waste of time and money.
- 4. Have you fully discussed the concept of mediation with the client, and is the client emotionally and intellectually prepared for the process?** The client must understand that mediation is different than litigation and that the attorney will be exercising different skills at the mediation. The client should be made aware of the strengths and weaknesses of the case and how the mediation process will work. Mediation is not a good time for the client to be surprised, which can reduce the likelihood of a successful result.
- 5. How important is it to have a public vindication of the claim; and conversely, how important is the confidentiality and privacy of the process and the outcome?** If both parties cannot commit to an assurance of confidentiality with respect to the process and the outcome, the mediation should not proceed. Along that same line, it is sometimes argued that mediation is not appropriate for those cases which demand some sort of public vindication. Where there is reasonable doubt that the process or result will be held confidential, mediation may not be appropriate.
- 6. What is the climate between the parties and counsel?** There are those cases where the parties recognize the benefit of resolving the case short of trial. Counsel needs to delve into the client's mind and get some understanding of the personal dynamics involved. Additionally, the advocates may have more of an acrimonious relationship than do the parties. The more rigid and hostile the parties and counsel are, the more difficult the case will be to resolve.
- 7. How receptive is the leadership of the organization to the process of mediation and/or the prospect of a monetary settlement?** Based upon the hierarchal structure of business organizations, certain leadership in the chain of command may oppose the process, particularly if critical areas of managerial or budgetary responsibility will be affected. These issues must be addressed pre-mediation if the mediation stands any chance of success. Counsel must obtain commitment to the process and potential outcome from all persons who will have a stake in the settlement.
- 8. Is there any possibility of providing "creative" solutions in the settlement beyond mere monetary terms?** One of the primary advantages of mediation is the ability to craft settlement terms outside the normal legal remedies which might otherwise be awarded in court. A careful exploration of a party's underlying interests may reveal the potential for creative settlement solutions, which is a positive indicator for mediation.
- 9. How important is it for counsel to maintain control over the process and/or the outcome?** Certain lawsuits have the potential to spiral out of control very quickly in terms of time and cost. Additionally, counsel may readily acknowledge that the client presents "control" issues, which poses problems with depositions and impacts the likelihood of a successful result at trial. If these issues are present, the argument in favor of mediation in a controlled setting is strengthened.
- 10. Do you have the right mediator for the case?** Counsel should have a good idea of what value the mediator can bring to the process. Different mediators have different styles and subject matter expertise, and counsel should put considerable effort into matching the mediator to the dispute, which can set the stage for a productive mediation.

While no single question discussed above should be relied upon to recommend for or against mediation, a combination of these factors may provide counsel with a reasonable recommendation. At a minimum, these questions provide a good framework for initial pre-mediation preparation by both the mediator and counsel.