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## Making the transition from litigation to mediation

By WILLIAM H. LEDBETTER JR.

To most of the legal profession, mediation is counter-intuitive. From our first day in law school, the focus has been on litigation. Why bother learning about a process that seems so different? There are several reasons.

First, because the Virginia Rules of Professional Conduct require it. Attorneys must advise clients about the availability of the various forms of dispute resolution and the possible advantages and disadvantages of each.

Second, the availability of mediation empowers attorneys to provide a more professional service to clients. Better results can be achieved. It is far less costly, time-consuming and stressful than litigation. It is private and confidential. And even if a mediation session proves unsuccessful in a particular case, no harm has been done.

Third, by serving clients in this way, lawyers can run their law practices more effectively and efficiently. It makes business sense as well as professional sense.

Lawyers are increasingly recognizing these realities and, as a consequence, improving their practices. As an indicator, Diane Strickland, a retired Roanoke circuit judge and ADR professional, observed in this newspaper last year that "the number of mediations convened annually [in Virginia] now far surpasses the number of jury trials conducted." (Virginia Lawyers Weekly, March 10, 2006.) Since then, the trend has continued and even accelerated.

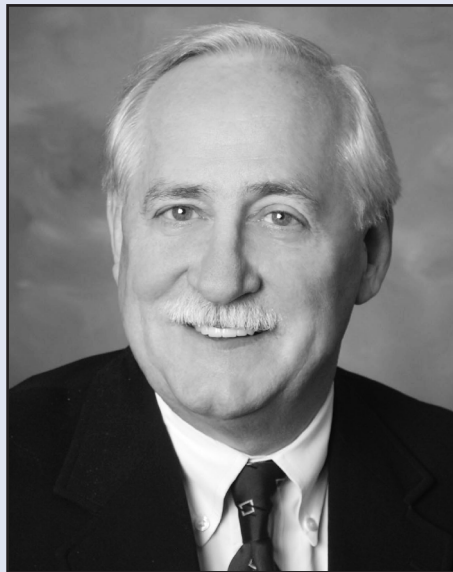
### Preparation is key

Of all the factors that are important for a litigator's successful shift to skillful mediation, preparation is the key. Has anyone ever attended a trial advocacy seminar at which thorough preparation was not (correctly) touted as the most important component of successful litigation? Mediation is no different.

In some respects, preparing for mediation is much like preparing for trial. One must be familiar with the facts, the relevant law and the content of pleadings. But in other ways preparing for mediation is markedly different.

**Timing.** Counsel must decide when to mediate, being mindful not only of the need to know enough about the case to evaluate it intelligently, but also to assess the client's desire to settle. Cost and time savings are also a part of this calculation. The right time may be before a complaint is filed, on the eve of trial, or after some discovery has been completed. There is no right answer. Attorneys need to decide the proper time to mediate on a case-by-case basis.

**Approach.** The goal is to resolve the dispute by a fair and mutually-acceptable compromise, not to unsheathe a sword, mount a white charger and do combat for a client's cause. Most people respond better to



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an approach that signals confidence but is not offensive or intimidating. Parties who feel the other side is trying to bully them in mediation often respond by behaving just as stridently, thereby making settlement difficult, if not impossible.

**Strategy.** Once this adjustment in vision and approach is in place, the attorney should devise a plan of action that will achieve the compromise position the client seeks. Of course, the plan cannot be immutable. Flexibility is vital to successful mediation. For example, if a claimant's attorney enters mediation thinking that the defendant is vicariously liable under the doctrine of respondeat superior, he needs to quickly adjust his position if defense counsel raises doubt about whether the tortfeasor is indeed an employee. Similarly, a defense attorney or claims representative who begins the mediation skeptical of the claimant's contention that her injury is disabling should be prepared to modify his position upon hearing from and viewing the claimant.

**Information Sharing.** The strategy should include using the mediator to full advantage. The attorney should consider whether it would be useful to disclose some relevant tidbit of information to the mediator, before the mediation begins, that may assist the mediator in understanding interpersonal relationships, a hidden agenda, or other dynamics in play. Ex parte communications are always permissible and sometimes indispensable. For instance, an attorney in a domestic relations dispute may notify the mediator that there are fault grounds on each side, but that the attorneys have resolved to try to downplay those issues in the upcoming property division mediation. A claimant's attorney can inform the mediator beforehand that the client may have unrealistically high expectations so that the mediator can develop a strategy to deal with the problem.

**Client Involvement.** Persons with real authority to settle the case must participate. For the claimant,

this may mean only the attendance of the client and counsel. On the other hand, a young adult may wish to confer with a parent or a married claimant with the spouse, at least when negotiations reach their concluding stages.

For the defense, someone with authority to settle the claim within a reasonable and foreseeable range must be in the room or, less desirable but usually workable, on speaker phone, so that the negotiations can move step by step, without interruption, to a final and binding settlement. One of the most common causes of impasse is the lack of enough "authority" to reach a settlement on terms that seem to be acceptable to everyone present without having to confer further, in detail, with a supervisor, or even a committee, at some distant place.

An acknowledged variation occurs when mediation involves a public body. Attorneys know that a negotiated settlement with a governmental entity may require subsequent approval by an authoritative body, often sitting in public session, before it can become final. Normally, this fact does not change the dynamics of the mediation process, but the client should be apprised of it before the mediation session.

In some cases, it may be just as important to consider who should not be present at the mediation as who should be. In domestic relations disputes, the involvement of an in-law can have a blackboard-scratching effect that impedes the process from the start. Similarly, a well-meaning but irate relative, or a "friend/significant other/adviser" whom the client thinks may be helpfully supportive in the negotiations, often proves to be more of a hindrance.

**Client Preparation.** Clients generally expect attorneys to be forceful, dynamic, theatrical, assertive and even downright combative in order to maximize the chances of a successful outcome in court. Such an approach is antithetical to successful mediation. It is critical to carefully explain the nature and purpose of the medi-

ation process, including how it differs from court, while assuring the client that if the negotiations are not successful, there will be a time and place for the more familiar adversarial techniques.

Clients need to know that patience is a cornerstone of successful mediation and that success often is achieved in small increments over the course of many hours. Clients should be encouraged to bring something to occupy themselves and to reduce frustration if discussions move at glacial pace, as they sometimes do. Further, the client should be prepared to receive unacceptable proposals for settlement without exasperation, understanding that proposals and counter-proposals that "test the boundaries" are commonplace in the search for a mutually-acceptable compromise.

**Client Presentation.** It is almost always helpful for the litigants to speak person-to-person in an initial joint session, however briefly, whether it be each spouse explaining his/her interests in a domestic relations dispute, or a claimant outlining the effects of his injury on his livelihood and life style, or a defendant expressing sincere regret for the claimant's travails. Although such remarks should seem to be extemporaneous, they should not be. Very few of us can make concise, helpful statements without some forethought.

**Attorney Presentation.** Speaking of extemporaneous comments, the attorney's presentation during the opening joint session should be no more off-the-cuff than opening statement in a jury trial. Granted, the presentation should be brief and quite informal, but that does not mean that it should not be well planned for the maximum impact upon all those sitting on the other side of the table.

**Reaching Agreement.** Are there impediments to resolution such as liens against recoverable funds or outstanding fees? What techniques should an attorney suggest to the mediator if an impasse occurs: "bracketing" or "book-ending," or some other device? Attorneys should not just leave it up to the mediator to think about how to get to "yes." Once the parties achieve resolution, counsel should be prepared to stay the extra time to get the settlement in writing with signatures.

Skilled litigators are comfortable in the courtroom because they know how to prepare effectively. As attorneys learn the secrets of preparing for mediation, they become just as comfortable with this increasingly popular, efficient and effective method of resolving disputes.

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