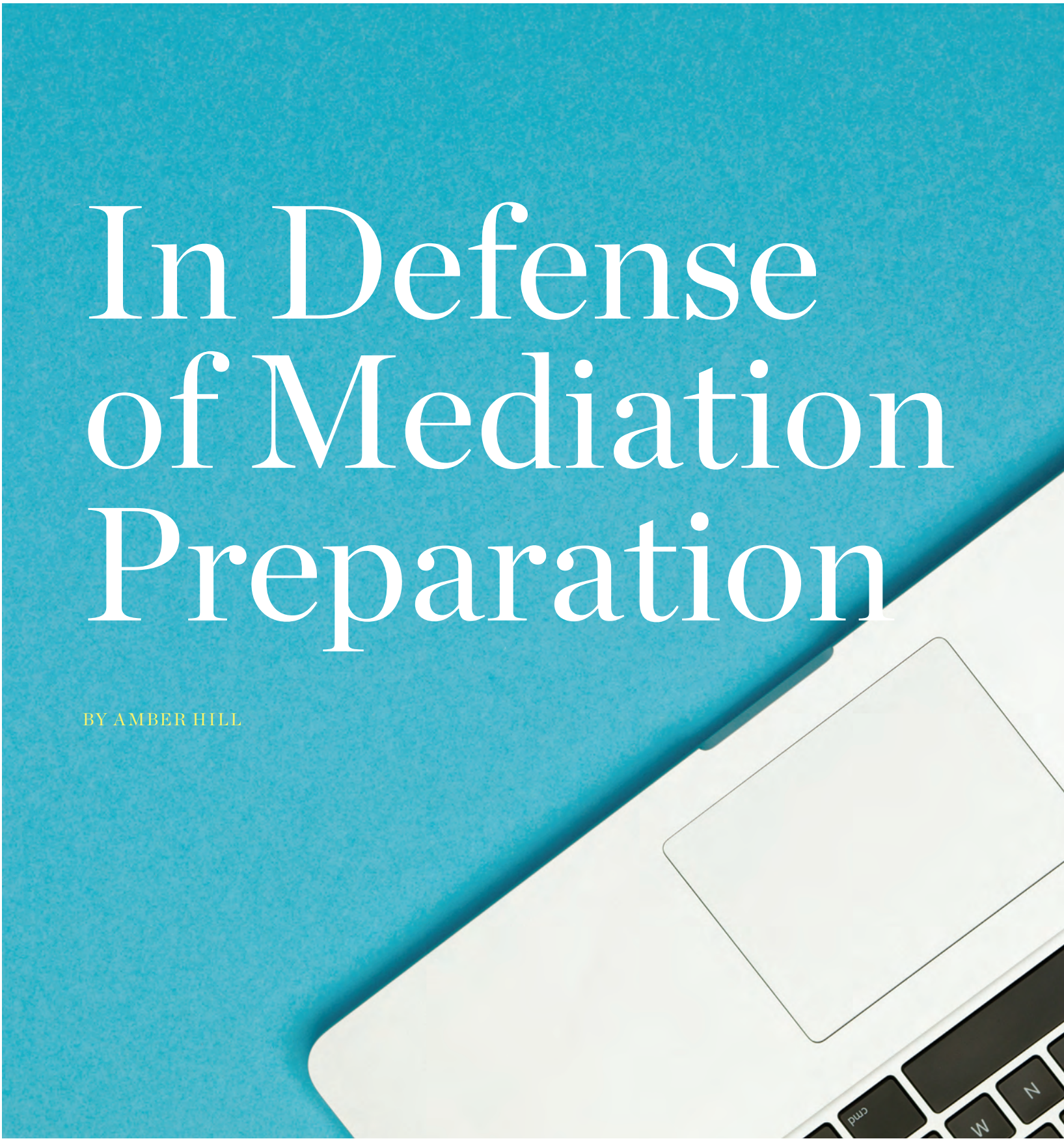
In Defense of Mediation Preparation

BY AMBER HILL



Proper planning for mediation benefits lawyers, clients, and the dispute outcome. This article describes how lawyers can prepare to be effective participants in a mediation.

Lawyers representing clients in mediation set themselves and their clients up for success with thoughtful preparation. Some lawyers hesitate to spend their time, and their client's money, on this type of groundwork, but the benefits of preparing for mediation, even if briefly, pay dividends when parties gather at the mediation table. Certainly, simply choosing mediation as a dispute resolution process has economic benefits, but parties and their attorneys optimize those benefits with mediation preparation.

Litigation, mediation, and other types of alternative dispute resolution (ADR) are different processes that each require a different type of preparation. This article describes basic tips that lawyers can use to prepare themselves and their clients for more fruitful mediation experiences.

Why Focus on Preparation?

Former Georgia Supreme Court Chief Justice Leah Ward Sears stated in an interview that mediation is a good tool for lawyers because it settles cases and promotes reasonable outcomes for clients.[1] To achieve these ends, she added, lawyers need to go into mediation with a focus on settling the case collaboratively, rather than using an oppositional approach. Even when cases do not settle in mediation, lawyers can move forward with an understanding of where the risks in the case remain.

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Preparing Clients

Many clients don't understand mediation, so attorneys should discuss with them ADR generally, and the mediation process specifically. The conversation should cover possible mediated outcomes to best manage clients' expectations and promote the best possible mediation experience. Toward that end, attorneys should include an overview of different conflict resolution approaches and the various risks and possibilities associated with each one.

Lawyers can reinforce that mediation provides the opportunity for parties to determine their own outcomes, as opposed to having a decision made for them by a judge or arbitrator. Here, it is helpful to discuss the probabilities of a good versus a bad outcome in mediation as compared with litigation or another form of dispute resolution. Describing the strengths and weaknesses of the case with clients educates them on the probabilities of different outcomes in the courtroom versus mediation. It is also a good idea to point out that if the evidence is weak or lacking, mediation can provide the opportunity for people who feel wronged to recoup a sense of justice and power, even if their optimal outcome is not achieved. Client understanding will grow with a discussion of the risks and benefits of each dispute resolution strategy.

Clients may also find value in the confidential and expedient nature of mediation. By reviewing the benefits of a confidential and efficient process, clients may better understand the opportunities at hand if they choose mediation. At the same time, this discussion provides lawyers with the opportunity to thoroughly understand their clients' interests and to advise them accordingly.

In sum, preparing clients enhances their decision-making abilities and promotes effective advocacy in lawyers.

Analyzing Alternatives

Lawyers and their clients benefit by understanding the best alternative to a negotiated agreement (BATNA) in a case.[2] The BATNA is the optimal option available to the client if a mediated agreement is not reached. The BATNA in mediation may also be compared to potential outcomes with other ADR strategies. If the possibilities on the mediation table are better than the alternatives, it is worthwhile to engage in mediation with enthusiasm. If an outcome outside of a mediated agreement is preferable, the lawyer and the client can identify the minimally agreeable settlement. Considerations may include time, money, and other client interests, such as apologies or exchanging goods. With this preparation, the lawyer and client are both clear on when to walk away from the mediation table.

It is also helpful for lawyers to discuss with clients if there are elements of the dispute that can best be resolved through creative approaches in mediation that are not available in litigation or other ADR strategies. From there, a picture develops of what the client deems an acceptable or unacceptable outcome of the mediation.

After understanding the client's BATNA, it is helpful for lawyers to think through the other party's BATNA. What are the needs that must be met for the opposing party to sign a mediated agreement? When would litigation be a better option for the other party? This helps further prepare the lawyer for the mediation and all possible outcomes.

Lawyers may also consider the zone of possible agreement (ZOPA).[3] Determining the areas of agreement between the client and the opposing party begins the process of finding common ground and reality checking unreasonable assumptions. This is especially important when the client does not appear to have a realistic understanding of what can happen as a result of mediation versus litigation for both parties. Lawyers should flesh out the distinction between competitive and cooperative conflict. Competitive conflicts are usually litigated and define the conflict as a larger issue of principle, are consumed by negative feelings, and focus on winning. Alternatively, cooperative conflicts frame the dispute in neutral terms for the purpose of collaborating and focusing on needs and goals.[4]

Strategizing

Negotiation theory often describes anchoring as a useful strategy for shifting the discussion in favor of the person who first provides an offer that is excessively advantageous. By starting with a number in the extreme, the conversation gets framed to that extreme end. In response, the theory goes, the outcome will be more favorable to that party than it otherwise would have been, due to the initial framing.[5] Parties do this with the understanding that the final decision will be less favorable than the first number, but in the hopes that the outcome will be closer to their favorable amount due to the anchoring strategy. Often, counteroffers are based on the initial anchor that framed the negotiation parameters.

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Anchoring can be a part of the dynamics in mediation and an effective strategy when used well, but it can also be detrimental. Offers that are outlandish or insulting to the other party may lead to an impasse. Thus, when anchoring is at play, offers must be palatable to the other side for the mediation to continue productively. Over-anchoring may cause a party to feel that the other side is either not serious about finding a solution or is being intimidating. The party may try to radically counteroffer with another unreasonable amount to bring the negotiation to a more favorable range, or disengage from the mediation altogether. Any agreements made in mediation need to be agreeable for both sides. Therefore, although anchoring can be effective, offers should fall within a reasonable ZOPA.

To demonstrate good faith, lawyers may provide an accounting for the math behind an offer, even if the offer is anchored with the expectation of adjustment throughout the mediation. Doing so roots the conversation in reality rather than postulation, even if the opposing side disagrees with some or all of the accounting and provides its own monetary range in response. Both sides must consider that everyone needs to have something to say “yes” to in the agreement that is more attractive than their BATNA.

Work with the Mediator

Since the mediator is neutral and not a decision-maker, lawyers and clients both benefit from working with the mediator so the mediation runs as smoothly as possible. The mediator stands outside the conflict, yet also works with both parties to ensure a balanced process,[6] reconcile the competing needs of the parties, and facilitate success.[7] Providing mediators with requested information, such as mediation statements before the mediation, sets up the mediation to be an efficient use of everyone's time. Therefore, any efforts to work with the mediator in supporting a productive process benefits lawyers and clients.

Mediation lacks the oppositional conflict of litigation, and lawyers do well to approach it differently. The overall approach to mediation should be collaborative. In mediation, lawyers have the opportunity to make offers, provide alternatives, and expand the options for settlement in ways that do not happen in front of a judge. If clients are seeking more intangibles, such as apologies or nonmonetary compensation, mediation is the opportunity to name those things and work them into agreements.

Lawyers should plan their opening presentation to frame the issues for the mediator. Rehearsing the presentation helps polish arguments and lends expediency to the process. This economizes time for the lawyers, clients, and mediator. From there, the mediation can proceed more quickly with a focus on settlement possibilities.

Work with the Other Side

Attorney Brian Rogers suggests that during mediation lawyers should be open with the other side about the weaknesses in their case to avoid surprise submissions and to demonstrate a thorough knowledge of the facts of the case.[8] Lawyers should emphasize shared interests and points of common understanding in pursuit of a mediated agreement.[9] Opponents will understand positive efforts and may respond reciprocally to move the mediation forward in a productive, collaborative direction. The mediator will similarly work to expand possibilities and find common ground.

Reciprocity can be a helpful strategy for lawyers in mediation when working collaboratively with the other side. This social psychology principle posits that information given freely without a formal agreement for mutuality evokes a social obligation for the other side to act in kind.[10] Parties may feel more conciliatory when experiencing the other side as operating in good faith and earnestly working toward agreement.

Conclusion

Preparing for mediation optimizes both the client's and lawyer's success in mediation. Approaching the process collaboratively by working with the mediator and the other side further contributes to a productive outcome. CL

Amber Hill owns and is a mediator at Hilltop Mediation, LLC, where she focuses on neighbor and family disputes. She also mediates through Douglas County's small claims mediation program, Jefferson County Mediation Services, and Court Mediation Services in Denver.

Coordinating Editor: Marshall Snider, msniderarb@comcast.net

NOTES

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3. Sebenius, "Negotiation Analysis: A Characterization and Review," 38(1) *Management Science* 18 (Jan. 1, 1992).
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5. PON Staff, Dealmaking and the Anchoring Effect in Negotiations, Program on Negotiation (Jan. 17, 2019), www.pon.harvard.edu/daily/dealmaking-daily/dealmaking-grappling-with-anchors-in-negotiation.
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10. McGuire, "The most powerful tools for a successful mediation," *Boston Bus. J.* (Feb. 25, 2019), www.bizjournals.com/boston/news/2019/02/25/the-most-powerful-tool-for-a-successful-mediation.html.

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Contact coordinating editors Jennifer Collins, jennifer.collins@denvergov.org, and Sheri Danz, sheridanz@coloradochildrep.org, to get started now!

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