

## Tips For Guiding Your Client Through The Mediation Process

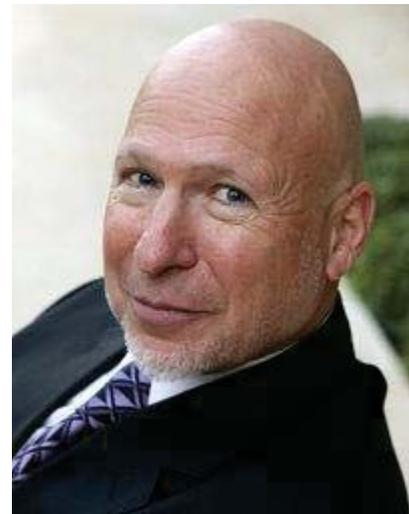
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With all the tangible and intangible costs associated with litigation today, mediation is becoming more common as a means of resolving disputes. Judges are ordering or at least recommending them, and contracts are stipulating them as part of their alternative dispute resolution clauses. As a result, good law schools around the country are including mediation and mediation advocacy courses in their curriculum, and many retired judges and lawyers are hanging out their shingles as they build their mediation practices.

Having mediated many disputes across a range of practice areas, I have noticed that attorneys trained and experienced in litigation, do not have the skills to guide their clients through a mediation process. Toward this end, I present some ideas and guidelines to help attorneys counsel and navigate their clients through a successful mediation.



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### Resolution vs. Justice

Besides the fact that arbitration is an adjudicated process and mediation is a negotiated process, there is another important distinction that flows from this, which relates to the product of each process. Whereas in arbitration the product that the parties are seeking is justice, and the arbitrator's focus is on the application of the law — in mediation, the product that the parties are seeking is resolution, and the focus of the mediator is on problem solving and negotiation.

Justice is guided by legal code, principles and doctrines, while resolution is guided by innovative thinking and creative solutions that meet all parties' needs to the greatest extent possible. Resolution in a mediation context, although cannot violate the law, nevertheless does not need to conform to what a court of law might rule. For example, in a marital dissolution case, justice in a court of law may stipulate that the parties must sell the marital home and divide the proceeds (in a community property state), whereas resolution in mediation may result in agreement that the wife may live in the property until the youngest child is 18 years old, in lieu of support. The resolution in this case does not conform to what a judge might rule, but at the same time does not violate the law and therefore is acceptable as part of a legal divorce decree.

It is important to explain to your client at the beginning of the mediation process that this is not an

arbitration where justice will be dispensed, but rather a process in which resolution will be crafted and in which he or she will be an active participant in the architecture and design of any resolution that will result.

### **Dealing with Your Client's Emotions**

In any dispute, and particularly ones which are already in advanced stages of litigation, disputants will be experiencing strong emotions such as anger, frustration, resentment, fear and stress. Besides clouding judgment and clarity of thought, it will also obstruct agreement and settlement. Highly skilled mediators will work through the emotional aspects of the dispute effectively, allowing parties to express themselves thereby freeing them from the emotional chains that impede productive negotiations and settlement. As an attorney representing a client in mediation, you cannot rely on the skills of the mediator. You need to work through the client's emotions before the mediation.

This means inducing the client to talk about their emotions by asking them questions such as: How are they feeling? What is making them feel that way? What are their perceptions about the dispute, the other party, the mediation process itself? What beliefs might be driving those perceptions? Do they think those beliefs are unequivocally true or are there assumptions that could be questioned? What are their greatest concerns and fears?

The purpose of allowing them to talk about their feelings is not to persuade or influence them not to feel that way, which of course would be futile, but rather to actively listen to them without judgment.

This will allow them to express themselves, vent, and to feel heard and understood. They will then be ready to let go of those emotions sufficiently to be able to contemplate settlement.

### **Uncovering and Understanding Your Client's True Needs**

As attorneys, we often project our positions on our clients and advocate for what we would want if we were in their shoes. Their needs may be very different however. For example in a breach of contract case where your client is the plaintiff, you may be advocating for the largest compensation possible plus punitive damages to the full extent of the law. Your client however, may still value an ongoing business relationship with the defendant over and above a one-time maximum award. Knowing this will produce a very different resolution in the mediation.

Before you go into the mediation, you need to work rigorously with your client to really uncover and understand what he/she truly wants and cares about. What are their deep underlying interests and what needs would have to be met for them to accept a deal that they are satisfied with, or at a minimum, they could live with. These underlying interests are commonly very different to their initial presenting positions and some serious probing and questioning is required to unpack them.

Having this information will drive your strategy in the mediation. Furthermore, you will have a reliable frame of reference against which to evaluate any proposal on the table by examining to what extent it meets your client's true needs. It will also help you to persuade your client as to why they should accept a particular proposal by showing them how it meets their true underlying needs that they discussed with you during the pre-mediation discussions.

## In the Mediation

Mediation is defined as a facilitated negotiation with the mediator as the facilitator who manages the process, works on behalf of all parties but advocates for none. The attorneys and their clients are the negotiators. As such, be prepared to take ownership of the negotiations, and don't allow the mediator to dictate, manipulate or impose. Don't react to the other side or to the mediator but be proactive in leading the negotiations.

To be an effective negotiator, you need to be able to ask good questions; develop information; provide sound reasoning; and keep an open flexible mind.

Let's say your client is suing the defendant for compensation on an undisputed copyright infringement. The mediator might ask you what your opening position or demand is. Instead of playing his game of haggling and bargaining, change the conversation with a question. You may say for example: "My client is seeking a fair compensation and we are open and flexible to ideas of how to establish that. What is their current thinking?"

He may come back and say that their opening position is \$200,000. Although the tendency is to flinch and counter with an extreme counter offer, a much more effective approach is again to ask a question and say: "Really? Could you perhaps go back and ask them how they arrived at that figure and why they believe it to be fair?" (thereby broadening the dialogue and eliciting information). Then be prepared to present your offer backed by sound reasoning: "We would suggest looking at how many illegal copies they sold and use the sum as a basis for establishing a fair compensation. This would come out to be around \$500,000." You now do not need to back down from your \$500,000 position unless they present an equally compelling reason that supports their position.

You have now shifted the discussion away from haggling to a discussion around relevant ways of establishing a fair compensation. By asking questions, soliciting information, providing logical reasoning and keeping an open mind, you are now leading the negotiations proactively rather than merely reacting.

Representing clients in mediation involves skill, talent and competency, much of which is beyond the scope of this brief article. However, following these guidelines will significantly improve your effectiveness in helping your clients navigate the mediation process, guiding them toward a satisfying resolution and saving them the exorbitant costs of litigation.

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